# A HISTORY OF ENGLISH LAW

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# PREFACE

THIS book is intended to be the first of two volumes dealing with the General History of English Law. The subject matter of this volume—the history of the courts and of the jurisdiction exercised by them at different periods—will, it is hoped, give a general view of the subject, which will enable the reader to understand more easily the history of the law itself. With the more important branches of such law the author intends to deal in the second volume.

In this small compass only a history in outline can be attempted. But treatises like Pollock and Maitland's "History of English Law," Holmes's "Common Law," and Thayer's "Evidence," the volumes of the Selden Society, the Year Books in the Rolls Series, and the learned publications of other Societies render such an outline the more possible.

To the student of law some such outline of the history of law is essential. A true knowledge of legal principles cannot be gained from the sections of statutes, or the short statements of digests, unless such information is supplemented by some study of the history of the law so summarized. Neither complete understanding, nor accurate statement of existing law is possible, without some knowledge of the basis upon which that law rests.

To the historian, and especially to the English constitutional historian, the history of English law must always be an important branch of study. Most constitutional questions have, in England, been fought out in the law courts, under the guise of controverted cases in constitutional law. It is true that the political significance of such cases is often more important than their legal significance. But neither can the true meaning of the cases be understood, nor can a just estimate be formed of the character of the persons and principles involved, unless such cases are approached, both from the political and from the legal standpoint. With the political significance of these cases the historian has in most instances fully dealt. Their examination, from a purely legal standpoint, may occasionally modify the judgment

which we should be inclined to pass upon them on purely political grounds, because it enables us to state more precisely, and, therefore, to understand more accurately, the strength and the weakness of the cases of the opposing parties.

The author desires to thank Sir Frederick Pollock for the generous loan of his lectures upon legal history. He desires also to thank Mr George Phillips, of the Inner Temple, who has relieved him of the task of preparing the index, and Mr J. Theodore Dodd, of Lincoln's Inn, and Mr Fortescue, of Brazenose College, for their assistance in the revision of the proof sheets.

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*April* 1903

# ABBREVIATIONS

## (1) LAW REPORTS

| | |
|---|---|
| Ad. and Ell. | Adolphus and Ellis. |
| And. | Anderson. |
| Atk. | Atkyns. |
| B. and Ad. | Barnewall and Adolphus. |
| A. and Ald. | Barnewall and Alderson |
| B. and C. | Barnewall and Cresswell. |
| Bing. | Bingham. |
| Brod. and Free. | Brodrick and Freemantle. |
| Buls. | Bulstrode. |
| Burr. | Burrow. |
| C. Rob. | Robinson's Admiralty Reports. |
| Chy. Cas. | Chancery Cases. |
| Cl. and Fin. | Clark and Finnelly. |
| Comb. | Comberbach. |
| C.B. N.S. | Common Bench, New Series. |
| Co. Rep. | Coke's Reports. |
| Cro. | Croke. |
| Cowp. | Cowper. |
| Dick. | Dickens. |
| Dougl. | Douglas. |
| Edw. | Edwards. |
| E. and B. | Ellis and Blackburn. |
| Ex. Rep. | Exchequer Reports. |
| Free. | Freeman. |
| Gall. | Gallison (United States). |
| Hagg. Admir. | Haggard Admiralty. |
| Hardr. | Hardres. |
| Hob. | Hobart. |
| H.L.C. | House of Lords' Cases. |
| H. and C. | Hurlstone and Coltman. |
| H. and N. | Hurlstone and Norman. |
| Hy. Bl. | Henry Blackstone. |
| J. and H. | Johnson and Hemming. |
| Keb. | Keble. |
| Knapp, P.C. | Knapp, Privy Council. |
| L.J. | Law Journal. |
| L.J. N.S. | Law Journal, New Series. |
| L.J. Q.B. | Law Journal, Queen's Bench. |
| L.J. Ch. | Law Journal, Chancery. |
| L.R. | Law Reports. |
| L.R. Q.B. | Law Reports, Queen's Bench. |
| L.R. C.P. | Law Reports, Common Pleas. |
| L.R. Ex. | Law Reports, Exchequer. |
| L.R. Eq. | Law Reports, Equity. |
| L.R. H.L. | Law Reports, English and Irish Appeals. |
| L.R. P. and D. | Law Reports, Probate and Divorce. |
| L.R. P.C. | Law Reports, Privy Council. |

| | |
|---|---|
| L.R. E. and A. | Law Reports, Ecclesiastical and Admiralty. |
| L.R. Ch. Ap. | Law Reports, Chancery Appeals. |
| L.R. Q.B.D. | Law Reports, Queen's Bench Division. |
| L.R. C.P.D. | Law Reports, Common Pleas Division. |
| L.R. Ex. D. | Law Reports, Exchequer Division. |
| L.R. C.D. | Law Reports, Chancery Division. |
| L.R. P.D. | Law Reports, Probate, Divorce, and Admiralty Division. |
| L.R. A.C. | Law Reports, Appeal Cases. |
| L.R. K.B. | Law Reports, King's Bench. |
| Leo. | Leonard. |
| Lev. | Levinz. |
| Lut. | Lutwyche. |
| Man. and Gr. | Manning and Granger. |
| M. and S. | Maule and Selwyn. |
| M. and W. | Meeson and Welsby. |
| Mod. | Modern Reports. |
| Moore, P.C. | Moore, Privy Council. |
| Moore, P.C. N.S. | Moore, Privy Council, New Series. |
| My. and Cr. | Mylne and Craig. |
| P. Wms. | Peere Williams. |
| Q.B. | Queen's Bench Reports. |
| Raym., Ld. | Lord Raymond. |
| Raym., Th. | Thomas Raymond. |
| Roll. Rep. | Rolle's Reports. |
| Salk. | Salkeld. |
| Sch. and Lef. | Schoales and Lefroy. |
| Shower. | Shower, King's Bench. |
| Shower, P.C. | Shower, Cases in Parliament. |
| Sid. | Siderfin. |
| Skin. | Skinner. |
| S.L.C. | Smith's Leading Cases, tenth edition. |
| S.T. | State Trials. |
| S.T. N.S. | State Trials, New Series. |
| Stra. | Strange. |
| Swanst. | Swanston. |
| T.R. | Term Reports (Durnford and East). |
| Toth. | Tothill. |
| Vern. | Vernon. |
| Ves. | Vesey. |
| Ves. Senr. | Vesey, Senior. |
| Wheaton. | Wheaton's Reports (United States). |
| W. and T. | White and Tudor's Leading Cases in Equity, seventh edition |
| Wils. | Wilson. |
| Y.B. | Year Book. |
| Yelv. | Yelverton. |
| Yo. and Coll. | Younge and Collyer. |

## (2) AUTHORITIES CITED

| | |
|---|---|
| Abbrev. Plac. | Placitorum Abbreviatio, Record Commission. |
| Bacon | Bacon's Works, edited by Spedding. |
| Bl. Comm. | Blackstone's Commentaries, first edition. |
| Cal. | Calendars of the Proceedings in Chancery, Record Commission. |
| C.S. | Camden Society. |
| Co. Litt. | Coke upon Littleton. |
| Dasent | Acts of the Privy Council, edited by John Roche Dasent. |

| | |
|---|---|
| Digby, R.P. | Digby's History of the Law of Real Property, fourth edition. |
| Dugdale, Orig. Jurid. | Dugdale's Origines Judiciales. |
| Engl. Hist. Rev. | English Historical Review. |
| F.N.B. | Fitz-herbert, Natura Brevium, seventh edition. |
| Hale, P.C. | Hale's Pleas of the Crown, Emlyn's edition. |
| Hallam, C.H. | Hallam's Constitutional History, ninth edition. |
| Hill. | Hillary Term. |
| L.Q.R. | Law Quarterly Review. |
| Madox | Madox's History of the Exchequer, edition 1769. |
| Mich. | Michaelmas Term. |
| Lives of the Norths | Edited by Jessopp. |
| Nicolas | Proceedings and Ordinances of the Privy Council, edited by Sir Harris Nicolas. |
| Pasch. | Easter Term. |
| P.Q.W. | Placita de Quo Warranto, Record Commission. |
| Pike, H. of L. | Pike's History of the House of Lords. |
| P. and M. | Pollock and Maitland's History of English Law, first edition. |
| Rec. Comm. | Record Commission. |
| Reeves, H.E.L. | Reeves' History of English Law, Finlason's edition. |
| R.S. | Rolls Series. |
| Rot. Cur. Reg. | Rotuli Curiæ Regis, Record Commission. |
| R.H. | Rotuli Hundredorum, Record Commission. |
| R.P. | Rotuli Parliamentorum. |
| R.S.C. | Rules of the Supreme Court. |
| S.S. | Selden Society. |
| Stephen, H.C.L. | Stephen's History of Criminal Law. |
| Stubbs, Sel. Ch. | Stubbs' Select Charters, sixth edition. |
| Stubbs, C.H. | Stubbs' Constitutional History, library edition. |
| Trin. | Trinity Term. |

# LIST OF CASES

## A



## B

I



J



K



L

M



N

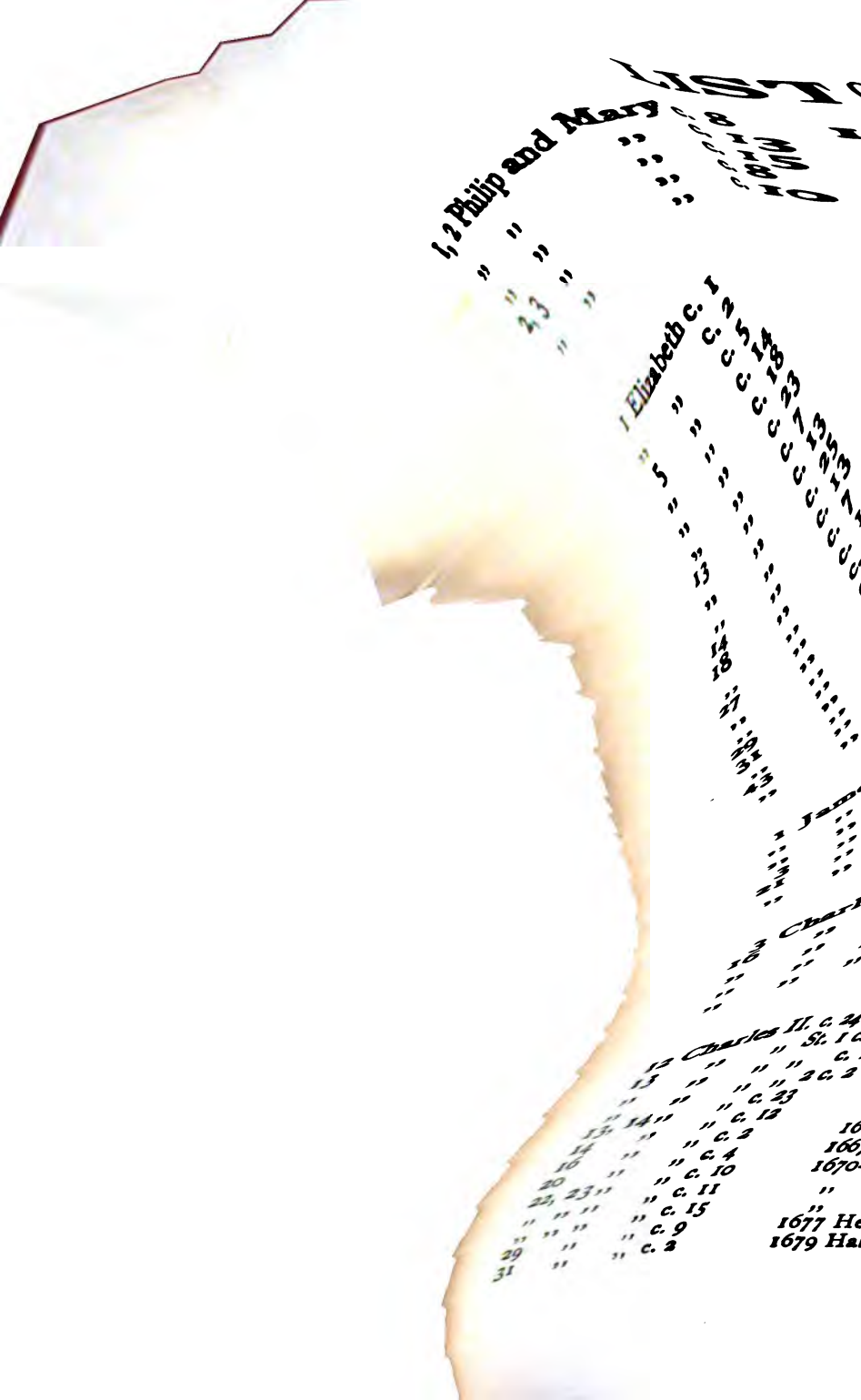


O



P

# LIST OF STATUTES



# INTRODUCTORY

LAW Courts and their rules of procedure are the substantive part of early bodies of law. As these law courts increase in power and enlarge their jurisdictions, the law which they apply becomes gradually more important than the courts which administer it. The law becomes the substantive part of the system. The procedure is merely adjective. But bodies of law which have grown up among such surroundings bear upon them the marks of their origin. The guiding lines of the legal system which they form cannot be explained without a reference to the courts by which they have been developed. Without such a reference we cannot explain the distinction between realty and personalty, between law and equity, between criminal and civil law. In Justinian's "Digest" the procedure of the courts, following an old arrangement, occupied almost the first place.[1]

The historian of a legal system must begin his tale in the days before the law courts have made much law. With the law courts, therefore, the history not only of the English, but of any legal system necessarily begins. The English legal system, however, maintains this connection with the law courts more closely than any other. This is no doubt due to its long and uninterrupted development upon its own lines. It has been shaped by the decisions of the courts. Courts of Common Law and Equity, Ecclesiastical Courts and Courts of Admiralty, Courts of the Merchants and the King's Council, have all played their part in its development. Some of these courts have ceased to exist; but their decisions remain to be applied by the courts which have succeeded to them. "The English jurisprudence," said Burke, "hath not any other sure foundation, nor consequently the lives and property of the subject any sure hold, but in the maxims, rules and principles,

[1] Maine, Early Law and Custom, chap. xi.

and judicial traditionary line of decisions contained in the notes taken, and from time to time published (mostly under the sanction of the judges) called Reports. . . . To give judgment privately is to put an end to Reports; and to put an end to Reports is to put an end to the law of England."

Reported cases are not merely a source of English law. They are the means for determining the conditions under which the other varied sources of English law are received and applied in practice. At the present day the Legislature interferes far more actively in the domain of pure law than at any former period. Judicial acuteness is exercised, not so much in developing new law from old by logical methods, as in answering the riddles propounded in the form of statutes by a sovereign legislature. But even at the present day the English lawyer must go to the cases, it may be to very old cases, before he can pronounce a certain opinion. The court, its procedure, and jurisdiction must be present to his mind if the cases are to be interpreted aright. Among the many archaic traits which English law preserves this dependence upon reported cases is perhaps the most archaic. But so inveterate is the habit of dependence upon the cases that lawyers hardly think of it as archaic.[1] They write rather of the "science of case law," because this case law forms the legal atmosphere within which they have their being.

[1] Lord Herschell found it necessary to insist with reference to the interpretation of a codifying statute, "that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground," Bank of England v. Vagliano, L.R. 1891, A.C. at p. 145.

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## CHAPTER I

## WILLIAM I.—JOHN

GLANVIL'S treatise[1] on the laws of England is the earliest text book on the common law. It purports to set forth the practice of the Curia Regis, the rules of which were the first laws common to the whole of England. With rules other than those laid down by the Curia Regis Glanvil does not profess to deal. He says: "Leges autem et jura regni scripto universaliter concludi nostris temporibus omnino quidem impossibile est, cum propter scribentium ignorantiam, tum propter earum multitudinem confusam."[2]

But of this confused multitude of laws it is necessary to say something in order to appreciate the work done by the Curia Regis, and in order to understand the law ultimately created by it.

The actual legislation of the period between William I. and Henry I. contains very little of the laws and customs of the country. We have a document in ten sections which probably contains the authentic laws of William I.[3] We have William I.'s ordinance forbidding bishops to sit in the hundred courts, and drawing a line between spiritual and secular jurisdiction.[4] We have Henry I.'s coronation charter,[5] and an ordinance for the due holding of the hundred and

[1] Written in the latter part of Henry II.'s reign some time after 1187 (see Bk. viii caps. 2 and 3).

[2] Prologue.

[3] Sel. Ch. 83-85. It deals with the oath of fealty; murders of Frenchmen; sales; method of trial in proceedings between English and French; a confirmation of the laws of Edward the Confessor; frankpledge, and the holding of the hundred and county courts; a prohibition of selling men extra patriam; and the abolition of capital punishment.

[4] Sel. Ch. 85.

[5] Sel. Ch. 99-102.

county courts.[1] We have two charters of Stephen's reign.[2] These laws and charters promise to redress abuses. They tell us little of the actual law to be observed except that it is to be the law of Edward the Confessor.

It was therefore important to know of what this law of Edward the Confessor consisted. The various attempts to describe it more than bear out Glanvil's statement as to its confused character.[3] The most comprehensive statement of the law of this period is that known as the *Leges Henrici Primi*,[4] composed about 1118. The writer's object is to state the laws of Edward the Confessor as amended by William I. and Henry I. We can see from his book that the contact of the confused Anglo-Saxon customs with the Norman law has produced a complicated mass of mixed rules. The laws of Cnut, the charter of Henry I., fragments of the Canon Law, with occasional references to the Salic law, the Lex Ribuaria, and the Frankish Capitularies make up the 94 chapters of the work.[5] But, as Professor Maitland points out, the idea of writing a text book upon a law which was neither Roman nor Canon was in 1118 a very original idea.[6] Less important books composed with the same object are:—(*1*) The *Quadripartitus* (1113-1118). This was a book composed in the reign of Henry I. It contains in the first book a Latin translation of the old English laws; and of these the writer regards the laws of Cnut as the most important, because they are the most recent. The second book contains some state papers of Henry I.'s reign. The third book about procedure, and the fourth about theft we do not possess. (2) The *Bilingual Laws of William I.*[7] They are a Latin and French text of the laws of Edward the Confessor, as understood under the Norman kings, together with some laws passed in William I.'s reign, and a few fragments of Roman law.[8] (*3*) The *Leges Edwardi Confessoris*.[9] This document states that William in the fourth year of his reign by the advice of his barons summoned twelve men from each county in order to state the rules of English law. It professes to be their statement of the law. But the document goes on to mention facts which happened in William II.'s reign.[10] The author shows a bias against the Danes, and in favour of the church. This attracted popularity; but its

[1] Sel. Ch. 103, 104. [2] Sel. Ch. 119-121. [3] P. and M. i 75-83.
[4] Thorpe, Ancient Laws and Institutes of England (Rec. Com.) i 497-608.
[5] L.Q.R. xiv 13; P. and M. i 78. [6] P. and M. i 78.
[7] Thorpe i 466-487. [8] E.g. caps. 33, 35, 36, 37.
[9] Thorpe i 442-464.
[10] Cap. xi William II.'s expedition to Normandy.

statements are hardly trustworthy unless otherwise confirmed. It was probably composed in Henry I.'s reign; and states, not so much the law, as the rules which a partial writer considered ought to be the law.[1]

We can see from these books that the law is composed of three main bodies of customs—the Mercian law, the Dane law, and the West Saxon law;[2] and to these we should perhaps add an admixture of Norman laws and customs.[3] If these laws are the same on any given point it is thought worthy of note.[4] Within these three districts also the customs of the different counties varied.[5] In addition to this grants of private jurisdiction had been so extensively made that they overshadowed the jurisdiction both of the king and of the county and hundred courts.[6] England is covered with a network of competing courts and conflicting jurisdictions, which have, as Professor Maitland points out, "their roots in various principles, in various rights, the rights of the king, of the church, of feudal lords, of ancient communities."[7]

Primitive ideas are proverbially vague; and the Anglo-Saxon mind was in legal matters no less misty than that of its neighbours. The mist was not effectually blown aside until the legal reforms of Henry II. made the rule of one supreme court, acting on newer principles, and manned by the ablest men of the age, felt throughout the country.

We propose to discuss the various courts which existed in England at this period under the following heads:—

(1) The communal courts.
(2) Private jurisdiction.
(3) The Curia Regis.

(1) The communal courts.

(i) The county court.

At the time of the Conquest all England is divided into

[1] P. and M. i 81, 82.

[2] Leg. Henr. vi 2. "Legis eciam Anglice trina est particio . . . Alia enim Westsexie, alia Mircena, alia Denelaga est." Cp. also ix 9; laws of William I. ii and viii; laws of Edward the Confessor xii and xxxiii.

[3] Dialogus de Scaccario I. xvi (Sel. Ch. 208). William is there said to have proclaimed the English laws, "secundum tripartitam distinctionem . . . quasdam reprobavit, quasdam autem approbans, illis transmarinas Neustriæ leges, quæ ad regni pacem tuendam efficacissimæ videbantur adjecit."

[4] Laws of William I. xxi. "Hoc generale est in Merchenalahe et Danelahe et Westsaxenelahe."

[5] Leg. Henr. lxiv 1, a custom of Hampshire; cp. Glanvil xiv 8; and Bracton f. 1 a. "Habent enim Anglici plurima ex consuetudine quæ non habent ex lege; sicut in diversis comitatibus, civitatibus, burgis, et villis ubi semper inquirendum erit quæ sit illius loci consuetudo, et qualiter utantur consuetudine qui consuetudines allegant."

[6] Below 9-19.

[7] P. and M. i 513.

counties.[1] This division is probably the result of different causes in different places. "The constitutional machinery of the shire," says Bishop Stubbs,[2] "represents either the national organisation of the several divisions created by West Saxon Conquest; or that of the early settlements which united in the Mercian kingdom, as it advanced westwards; or the re-arrangement by the West Saxon dynasty of the whole of England on the principles already at work in its own shires."

The officials of the county were in Anglo-Saxon times the earldorman, the bishop and the sheriff. The great earldormen in Saxon times were the rulers almost of provinces.[3] After the Conquest they disappear. The term earl becomes a mere title.[4] His ancient connexion with the county lives only in the fact that he is endowed with its third penny.[5] Similarly the severance after the Conquest of the spheres of ecclesiastical and lay jurisdiction tends to remove the bishops from official participation in the business of the county. They appear in the county court as great landowners rather than as bishops. The sheriff or vicecomes is the executive officer of the county directly responsible to the crown for its government.[6] He must account for all payments due from the county to the king. Often the county was let to the sheriff at a rent or ferm, and he made what he could of it.[7] He must execute royal writs or orders addressed to him.[8] He must hold the county court.[9]

The county court was, at the time of the Conquest, composed of a heterogeneous body of persons. "Intersint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermanni,

[1] The term county takes the place of the Anglo-Saxon shire. [2] C.H. i 130.
[3] Ibid 138. [4] Bracton (R.S.) Introd. v, xx and xlviii.
[5] Dialogus de Scaccario I. xvii (Sel. Ch. 209). "Comes autem est qui tertiam portionem eorum quæ de placitis proveniunt in quolibet comitatu percipit . . . qui ideo sic dici dicitur, quia fisco socius est et comes in percipiendis." In later times the titular earl might be vicecomes of the county—e.g. William de Warenne earl of Surrey was sheriff of Surrey in Henry III.'s reign. Stubbs, C.H. i 407-413.
[6] So it is said in the Dialogus I. i (Sel. Ch. 171). "Item sicut in lusili pugna committitur inter reges: sic in hoc inter duos principaliter conflictus est et pugna committitur, thesaurarium scilicet et vicecomitem qui assidet ad compotum."
[7] Stubbs, C.H. i 430-433. In addition he would be obliged to account for the Danegeld and the royal income arising from feudal rights.
[8] Stubbs, C.H. 216, 446. Stubbs says of the Norman period, "The custom of interference of the crown by writ, though not unprecedented, is, as a custom, new."
[9] The style of the court, as finally fixed, is "Buckinghamshire. Curia Comitatus E.C. militis Vicecomitis Comitatus prædicti tenta apud B," Coke, 4th Instit. cap. 55.

prefecti, prepositi, barones, vavassores, tungrevii, et ceteri terrarum domini."[1] The great baron represented his possessions. If necessary the reeve and four men from the vill represented the vill.[2] Attendance at the county court was regarded as a burden—much as serving on a jury is regarded at the present day.[3] The tendency was to connect this burden of suit to the court (secta), like the burden of military service, with certain pieces of land, the holders of which were obliged to attend by the terms of their tenure—to make, in fact, suit a real rather than a personal burden. Possibly this tendency had not gone far at the time of the Leges Henrici. Suit was then as much personal as real.[4] By the reign of Henry III. it was real rather than personal. The owner of a tract of land owes suit. Division of the land does not increase the burden of suit. We read of tenants liable to thirds of a suit.[5] The suitors of the court were thus a defined class. In later statutes the suitors are mentioned as a class separate from the other persons present at the court.[6]

The suitors give the judgment of the court—they are not in any sense a jury which only finds the facts. The sheriff is not the judge but the president of the court.[7] "Regis judices sunt barones comitatus qui liberas in eis terras habent."[8] "Viles vel inopes personæ" are not admissible. The principle seems to be that each litigant shall be judged "per pares suos et ejusdem provinciæ."[9] Sometimes

[1] Leg. Henr. vii 2. See P. and M. i 532, 533. "The words are vague; they point to no one clearly established rule, but rather to a struggle between various principles." Cp. the persons summoned in Bracton's day to meet the justices in eyre, f. 109 b. "Omnes archiepiscopos, episcopos, abbates, priores, comites, barones, milites, et liberos tenentes de tota balliva tua, et de qualibet villa quatuor legales homines et præpositum, et de quolibet burgo duodecim legales homines burgenses . . . et omnes illos qui coram justitiariis itinerantibus venire solent et debent."

[2] Leg. Henr. vii 7.

[3] Engl. Hist. Review iii 417; 20 Henry III. c. 10 (Statute of Merton), suit could be done by attorney to county, hundred, or feudal courts.

[4] Just as it is said with regard to jurisdiction, "nec sequitur socna regis data maneria sed magis ex personis," Leg. Henr. xix.

[5] Engl. Hist. Review iii 418. See the entry from the Hundred Rolls there quoted concerning the vill of Bottisham in Cambridgeshire: "Dominus Simon de Mora tenet unam virgatam terræ de eodem Comite et facit sectam ad comitatum et hundredum pro comite et pro tota villata," (p. 417), P. and M. i 528. Suit is claimed as if it were any other service. A claim was made against Roger Bigod, count of Suffolk, for suit to the hundred court, "de qua secta dominus Henricus Rex pater Dom' Regis nunc fuit in seisina quousque antequam prædicti comitis prædictam sectam Dom' Regi subtraxerunt." It is left to the jury to say whether the king or the count has the greater right. Verdict for the count. P.Q.W. 730.

[6] 7 Henry IV. c. 15, provides that all present at the court are to attend the election of knights of the shire, "as well suitors duly summoned for the same cause as others."

[7] P. and M. i 535-537.

[8] Leg. Henr. xxix 1.

[9] Ibid xxxi 7.

apparently they may choose their judges.[1] If there is a difference of opinion it is said in one place that the views of the majority prevail,[2] in another that the views of the better part prevail.[3] The suitors continue to the end to be the judges of the county court. Thus it is the county and not the sheriff which is in later times amerced by the royal judges for false judgment or for irregularities in procedure.[4] In Blackstone's time the writ of false judgment, which lay to reverse the decision of the county court, must be brought to Westminster by four legal knights of the county who had taken part in the proceedings.[5]

The jurisdiction of the county court was general. Modern systems of law give general jurisdiction only to the superior courts. The lower courts try the less important cases, and there may or may not be an appeal from them to the superior courts. But at this period both the county and hundred courts were for most purposes courts of general jurisdiction. It was only if a party could not get justice in the hundred court that he could sue in the county court. It was only if he could not get justice in the county court that he could bring his case before the king or the Witan.[6] This generally resulted in the greater men being sued in the more important courts. These courts alone had sufficient power to deal with them. Thus in the Norman period the county court entertains criminal cases—the pleas of the crown;[7] suits for lands arising between the tenants of different lords;[8] actions for various wrongs, and actions for debt. In the last resort it could outlaw the defendant who refused to appear; and this power it retained to the end, to the exclusion even of the royal courts.[9] In addition to this, the county court was the place where the general work of the county, military and financial, was carried out. Proclamations, and in later days, Acts of Parliament were published there by the sheriff.[10] The charters made by private persons were often read before the court.[11]

[1] Leg. Henr. xxxi 8. [2] Ibid v 6. [3] xxxi 2.

[4] Hengham, Magna cap. 4.

[5] Bl. Comm. iii 34; cp. the writ App. IX. The writ orders the sheriff to carry the record to Westminster, "sub sigillo tuo et per quatuor legales milites ejusdem comitatus ex illis qui recordo illi interfuerunt."

[6] Stubbs, C.H. i 135, 446; Laws of Cnut (Secular) 17, 19 (Thorpe i 385, 387). [7] Leg. Henr. vii 3.

[8] Sel. Ch. 103, 104 (Writ of Henry I. for holding the shire and hundred courts), "Et si amodo exsurgat placitum de divisione terrarum, si est inter barones meos dominicos tractetur placitum in curia mea: et si est inter vavassores duorum dominorum tractetur in comitatu."

[9] P. and M. i 541, 542; L.Q.R. xviii 297. [10] Stephen, H.C.L. i 81.

[11] Bracton advocates this practice (f. 38) "utilius et melius si in locis publicis sicut in comitatu et hundredo, ut facilius probari possit."

We are told in the Leges Henrici[1] that the court was held twice a year. But if it had much business to do it is difficult to think that it sat so seldom.[2] Possibly in early days the hundred courts did much of the work afterwards done by the county court. In later days it sat from month to month; and in some places at intervals of six weeks.[3] Possibly it held less solemn sessions more frequently, in which the interlocutory business was done. This conjecture of Professor Maitland's is certainly supported by evidence from the reign of Edward I.[4]

(ii) The Hundred Court.

The county is divided into hundreds, wapentakes or wards. The size and regularity of these divisions increase as we leave Wessex and go N. and E.; and the name hundred gives place to the name wapentake and ward. The term hundred first appears in Edgar's law. There seems to be some ground for thinking that it is a West Saxon institution which gradually spread over the county with the supremacy of Wessex.[5]

The official of the hundred is, in Saxon times, the hundreds-earldor; in later times a bailiff or deputy of the sheriff, who often farmed the hundred as the sheriff farmed the shire.[6]

As with the county so with the hundred the suitors give the judgment of the court. They were much the same class of persons as composed the county court;[7] and similarly in later times the duty of suit came to be incumbent on the holders of certain pieces of land. According to a law of Ethelred the twelve senior thegns seem to have acted as the judicial committee of the court for the purposes of accusation.[8] Whether this committee also acted

[1] vii 4; li 2.

[2] P. and M. i 525.

[3] Magna Carta (1217) cap. 42; 2, 3 Ed. VI. c. 25; Stubbs, C.H. i 679.

[4] P. and M. i 526. The Hundred Rolls show there are two classes of suitors. One class is bound to go to the "great" or "general" counties twice a year. The other is bound to attend from month to month.

[5] Stubbs, C.H. i 109-112; P. and M. i 543, 544.

[6] P. and M. i 544; Stubbs, C.H. i 122. This arrangement called for the interference of later legislation. 4 Ed. III. c. 15, sheriffs have let hundreds and wapentakes at so high a ferm that it cannot be levied without extortion. They are to be let at the old ferm. 4 Hy. IV. c. 5, 23 Hy. VI. c. 9, sheriffs are prohibited from letting to farm hundreds and wapentakes.

[7] Leg. Henr. vii 8.

[8] Thorpe i 295, Sel. Ch. 72. "And that a gemot be held in every wapentake; and the xii senior thanes go out, and the reeve with them, and swear on the relic that is given to them in hand, that they will accuse no innocent man nor conceal any guilty one." The question is whether or not these xii senior thanes were in any sense a body who *presented criminals for trial* like the 12 legal men of the hundred upon whom this duty was imposed by the assize of Clarendon.

in the other cases in which the court could declare folk-right is not clear. The jurisdiction of the court is general like that of the county; but it did not at this period try criminal cases or cases of claims to land.[1]

According to the laws of Henry I. the hundred was liable for the murder fine.[2] This liability was introduced by the Norman kings and lasted until it was abolished in Edward III.'s reign.[3] Whether in Saxon times the hundred could ever be held liable for breach of its duties does not appear. But in later times, when the Government had become more centralized, the hundred, like the county, could be made liable for false judgment, and for the breach of various duties, statutory and otherwise.[4]

The court was according to the laws of Henry I. held twelve times a year.[5] In Henry II.'s reign it met once a fortnight. An ordinance of 1234 required it to sit once in three weeks.[6]

(iii) Vill, tithing, and Frankpledge.

The whole of the county is divided into vills and tithings. The vill is a local subdivision of the hundred.[7] The tithing is a group of ten, twelve, or more persons, under the superintendence of a tithing man, mutually responsible for one another's misdeeds.[8] But in some places the vill is the tithing.[9] This system of mutual responsibility is called the Frithborh or Frankpledge.

Stubbs seems to think they are, (C.H. i 121, 122, 448). We shall see that the inquest by jury was certainly not of Anglo-Saxon origin, (below, 145.) Maitland (Select Pleas in Manorial Courts, (S.S.) xxxvi, xxxvii) doubts whether we can trace any connexion between the two laws. We know that the hundred had its special peace (Stubbs, C.H. i 122). The hundred may accuse a person "quod murdrum fecerit" (Leg. Henr. xcii 16). The hundred may wish to prove that a murdered man was not French, "xii melioribus hominibus hundreti," (ibid xcii 11). The xii senior thanes may thus have acted on behalf of the hundred when the hundred was interested. The law of Ethelred may therefore be explained without supposing that there was any presentation of offences committed by individuals in the hundred. That seems in Anglo-Saxon times to have been left to the individuals injured.

[1] P. and M. i 544. Cp. for the Saxon period Stubbs, C.H. i. 122.

[2] xcii 1, 9.

[3] 14 Ed. III. stat. i. c. 4. There are cases of such presentments occurring after the statute (Select Coroners Rolls (S.S.) xliii). The vill however still might be amerced if a person were slain and the offender escaped. If the vill cannot pay, the hundred is in some cases liable, and in default the county. 3 Hy. VII. c. 1 § 6; Coke, 3rd Instit. 53; Hale, Pleas of the Crown i. 448.

[4] Stat. of Winchester (1285) § ii (Sel. Ch. 473); Madox, Exchequer i 543-549, 557-568 gives an instructive list of the varied offences of which vills and hundreds were capable.

[5] vii 4.

[6] P. and M. i 544.

[7] P. and M. i 547-554.

[8] Ibid i 554-558.

[9] Select Pleas in Manorial Courts (S.S.) xxx; Stubbs, C.H. i 97-99.

As the organization of the country becomes more fixed under the influence of Henry II.'s reforms we find that the vill is made liable for the performance of very varied duties.[1] Under the Norman kings it is liable to contribute to the Murdrum when this fine is imposed upon the hundred; and it must see to the due maintenance of the system of frankpledge.

For the latter purpose the sheriff held twice a year a specially full meeting of the hundred court.[2] This was called in later times the sheriff's tourn. "Speciali tamen plenitudine, si opus est, bis in anno conveniant in hundretum suum quicunque liberi . . . ad dinoscendum, scilicet, inter cetera, si decanie plena sint. . . . Presit autem singulis hominum novenis decimus."[3] All persons from the age of twelve years must thus be brought into frankpledge. But if a body of persons are under a lord he will be answerable for them; "tenet familiam suam in pledgio suo, et si accusetur in aliquo respondeat in hundreto."[4]

Such is the system of communal courts under the Norman and Angevin kings. They, as we shall see, maintained and strengthened the system. At the latter part of the Anglo-Saxon period it had been thrown into entire confusion by the growth of private jurisdiction. All through this period this private jurisdiction divides with the communal courts the local government of the country.

(2) Private Jurisdiction.

In all the later Anglo-Saxon laws, and in all the treatises which attempt to describe the laws of Edward the Confessor, the fact that much of the jurisdiction of the country is in the hands of the larger landowners is assumed. To this state of things the vague and compendious word "feudalism" is generally applied. But "the impossible task that has been set before the word feudalism is that of making a single idea represent a very large piece of the world's history, represent France, Italy, Germany, England of every century from the 8th or 9th to the 14th or 15th."[5] The hackneyed question whether the Norman Conquest introduced or stopped the growth of feudalism sufficiently illustrates the vagueness of the term. A statement in this period that the government of a country is feudal tells us about as much and as little as a statement in the 19th century that a country has a system of repre-

[1] See references to Madox above p. 8 n. 4. Till 22 Geo. II. c. 46 § 34 this liability could be enforced against the inhabitants of the vill severally. See P. and M. i 606.

[2] Laws of Edward the Confessor xx (Sel. Ch. 77).

[3] Leg. Henr. viii 1.

[4] Ibid xli 6. Cp. Bracton f. 124 b.

[5] P. and M. i 44.

sentative government. We get a general idea but nothing more. In general terms we may say that feudalism comprises both a system of land tenure and a system of government. The holding of land gives a certain jurisdiction over those who dwell upon the land so held; and thus, the powers of government are split up among the land holders of the country.

Similar causes produced similar results in most of the countries of Europe at this period.[1] But both causes and results differ in detail. We must shortly sketch the development of the system in England because the peculiarities of this development have left their traces in the history of English law. Unfortunately this involves an incursion into Anglo-Saxon history—the period "beyond Domesday," when scattered facts must be connected by conjecture in default of more certain revelation.

We shall consider (i) Anglo-Saxon feudalism; (ii) the effect of the Norman Conquest.

(i) Anglo-Saxon feudalism.

In Anglo-Saxon times such legally distinct things as property, jurisdiction, the profits of jurisdiction, and the produce of taxation seem blended together in a common mass. "The word dominium, says Professor Maitland, has to cover both proprietary rights and many kinds of political power."[2] The king has land; the earldormen have land. But no distinction is drawn between private property and official property.[3] The king also has certain rights of jurisdiction over land which bring him in certain profits. He grants either the jurisdiction itself or the profits; and little distinction was probably drawn between the two forms of grant.[4] New taxes, for instance the Danegeld, are imposed. This gives another new right or immunity to be granted or sold.[5] The idea that political rights and offices and privileges are property to be dealt in was perpetuated in a modified form

[1] Stubbs, C.H. i 286-292; P. and M. chap. ii.

[2] Domesday Book and Beyond 344.

[3] Ibid 168, 169. "A vast amount of land is or has recently been held by office holders, by the holders of the kingship, the earlships, or the earldormanships. We seem to see their proprietary rights arising in the sphere of public law, growing out of governmental rights, which however themselves are conceived as being in some sort proprietary."

[4] Ibid 102.

[5] Ibid 240. "Every increase in the needs of the state . . . gives the king new rights in the land. . . . If a fleet be formed to resist the Danes the king has . . . a new immunity for sale. If a geld be levied to buy off the Danes the king can sell a freedom from this tax, or he can tell the monks of St Edmundsbury that they may levy the tax from their men, and keep it for their own use."

by the feudalism of later days; and it has died hard.[1] That it was possible to distinguish them seems hardly to have occurred to the Anglo-Saxon mind. It is true that in such grants certain duties like the trinoda necessitas are usually reserved. But exemption even from this is occasionally granted.[2] The laws of Cnut reserve certain pleas of the crown, "unless he (the king) will more amply honour anyone, and concede to him this worship."[3] In the laws of Henry I. it is said that a certain jurisdiction belongs to the crown; but the qualification is repeated.[4]

The most usual words in which these grants of jurisdiction are contained are sac et soc, toll and team, infangthef and utfangthef, frithsoken. Little that is certain can be said as to their meaning as, owing to the rise of new remedies and a new legal language, they were already almost obsolete in the 13th century. Sac[5] seems to mean a cause or matter before a court—what in later law Latin is termed placitum. Soc[5] has a similar meaning. It is apparently derived from a word which means seeking. It means either that a man may seek, investigate or enquire into certain causes; or that certain litigants must seek or make suit to a certain court. Toll[6] is defined as the right to take tallage of one's villeins. Team[7] is variously interpreted. The most probable meaning seems to be the right to hold a court in which a stranger can be vouched as a warrantor. Infangthef[8] means the right to hang a thief under one's own jurisdiction caught "hand having or back-bearing" on one's own land. Utfang-

[1] Stubbs, C.H. i 402, 434, 558, 560; 12 Rich. II. c. 2; 5, 6 Ed. VI. c. 16; Grand Remonstrance §§ 30, 48; Blankard v. Galdy (1693), 4 Mod. 222 (Sale of office of provost marshal in Jamaica). In Rex. v. Vaughan (1769), 4 Burr. 2494, it was said arguendo "the office of clerk of the supreme court of the island of Jamaica was sold under a decree in Chancery, upon the c.q. trust of it dying insolvent. Mr Lawton bought it, and afterwards devised one moiety of it. The representatives of Mr Paxton sold the other moiety. The subdivisions of it have since been both devised and sold. The office was consequently very carelessly executed by deputies." Till the last century offices about the courts were sold by the judges, and held in trust for them, (Campbell, Chief Justices iii 156). It was laid down in Auditor Curle's case (1610), 11 Co. Rep. 4, that no grant in reversion can be made of a judicial office. This was probably new, as no authority is cited. In Veal v. Prior (1664), Hardres, 351, 357, Hale said that by custom such grants could be supported.

[2] Domesday Book and Beyond 273, 274.

[3] Laws of Cnut (Secular) 12, (Thorpe i 383). These rights are in terms granted to the Archbishop of Canterbury, Domesday Book and Beyond 261; Bigelow, Placita Anglo-Normanica 4-9.

[4] Leges Henr. xx. 3.

[5] Domesday Book and Beyond 84, 259; Select Pleas in Manorial Courts (S.S.) xxii, xxiii; P. and M. i 567.

[6] Select Pleas in Manorial Courts xxii; P. and M. i 566.

[7] Select Pleas in Manorial Courts xxiii; P. and M. i 568.

[8] P. and M. i 564.

thef[1] means the right to hang such a thief similarly caught but whether or not the capture is made on one's own land. Frithsoken[2] is the right to take the view of frankpledge.

The extent to which these grants of mixed proprietary, justiciary, and fiscal rights have gone receive their most striking exemplification in the grants of the Anglo-Saxon kings to the church. It is probably in such grants to St Cuthbert of Durham that the foundation of the county Palatine of later law was laid.[3] Thus King Oswald endowed Aidan of Lindisfarne. His grants were added to by Ecgfrith and Ceolwulf. Guthred granted all the land between the Tyne and the Wear "cum jure regali." Alfred granted all the land between the Tyne and the Tees "cum regalitate," confirmed Guthred's grant, and provided that all land afterwards purchased should be held as freely. Athelstan made further grants when St Cuthbert's body was transferred to Durham. Cnut granted that no person except those who served the saint should interfere within these territories.[4] This is but one example out of many such grants to churches.[5] And these grants were not confined to the churches. Thus we read that Godwin had a manor in Hampshire to which belonged the third penny of six hundreds.[6] But grants to churches were the most common. Laymen generally acquired their rights from other causes with which we shall deal immediately. But these grants sufficiently illustrate the absence of any distinct legal conceptions. What was granted in these cases was not merely the rights of a landlord, but the rights of the state. In modern terms we should talk, as Professor Maitland points out, rather of a cession than of a conveyance. What the king did other landowners imitated. Bishop Oswald leased land to a knight free from all secular service save the trinoda

[1] P. and M. i 564.

[2] P. and M. i 567; below, 63. For a longer list of these franchises see Domesday Book and Beyond 266; Red Book of the Exchequer (R.S.) iii 1032-1039. The franchises named in the text are the most common. They are the franchises explained by Bracton, f. 154 b. and in the laws of Edward the Confessor c. 22 (Sel. Ch. 78). Offences usually reserved to the crown's jurisdiction are *Hamsocne*, forcible attack on a homestead; *Forsteal*, a treacherous attack on one's enemy while on a journey; *Flymena-fyrm*, the harbouring of outlaws. But they are sometimes granted to private persons.

[3] Registrum Dunelmense (R.S.) i, lxiii.

[4] Ibid xv, xx, xxiii, xxix, lx-lxiv.

[5] Domesday Book and Beyond 228, 229. Cp. Ethelweard's charter to Evesham Abbey (ibid 235). The land is freed from taxes, purveyance, military service, and royal works "ab omni publico vectigali, a victu, ab expeditione, ab opere regio." See ibid 273, 274 for other grants which free from the trinoda necessitas.

[6] Ibid 170.

necessitas.[1] The Bishop of Durham in 1228 granted land and the most extensive immunities to the Prior and Convent of Durham.[2] It was probably a comparatively new principle which Glanvil stated when he laid it down as a rule of the king's court that royal officers could not delegate to others jurisdiction which had been vested in them by the crown.[3]

These grants of land and privileges, therefore, illustrate the want of distinction existing between rights of property and powers of government; and they point to one of the causes of the growth of private jurisdiction. But there were also other causes resting on different principles, but working toward the same result.

The first set of these causes, we may say, operated from below.

It was convenient in many ways to the small freeman to "commend" himself to a powerful landowner. The small man was more fully protected both from lawlessness and from litigation. The lord got another retainer.[4] He does not however necessarily get any rights over the man's land. We read of men who can go with their land to what lord they please.[5] But, as we might expect, the lord's rights are regarded as a property which can descend to his heirs.[6] It was easy for this personal commendation to become a servitude of a much more oppressive kind. In bad seasons money or stock must be borrowed. Hostile raids and the Danegeld must have had similar effects; for the weight of the Danegeld was such that "it was fully capable of transmuting a whole nation."[7] The pecuniary fines for injury to life and limb—the bot, wer, and wite, were very heavy.[8] For all these causes the lord was able to tighten his hand on the man. In addition we

[1] Domesday Book and Beyond 289.

[2] Registrum Dunelmense (R.S.) i, lxxii-lxxvi.

[3] Glanvil xii 19, "Non est consuetudo quod ex quo aliquod negotium pertinens ad justicias meas aliquibus injungetur tractandum, quod ipsi id in alios transferant de re aliqua quæ ad justiciam meam pertinet." So Bracton f. 333 b. "justitiarius justitiarium substituere non potest."

[4] Domesday Book and Beyond 69-71; Leg. Henr. lxxxii 6. "Et in quibusdam potest dominus homini suo warantus esse, si precepto suo verberaverit, vel alio modo contristaverit aliquem. . . . In quibusdam vero non poterit." Ibid lxxxii 3. "Et unicuique licet domino suo sine wita subvenire, si quis assaliet eum, et in omnibus legitimis obedire, preterquam in prodicione, furto, murdro, et deinceps similibus." [5] Domesday Book and Beyond 72. [6] Ibid 74.

[7] Ibid 7, 8. Cp. Maine, Early History of Institutions, Lecture VI. The effect of a chief, according to the Irish laws, giving or lending stock is there described as producing all the effects of commendation.

[8] Domesday Book and Beyond 44. "The sons of a villanus who had but two oxen must have been under some temptation to wish that their father would get himself killed by a solvent thegn."

have those extensive grants of jurisdiction which have already been mentioned. The small freeholder may be at once the man, the debtor, and the subject of his lord. That the lord has jurisdiction seems to be laid down almost as a general rule in the Leges Henrici.[1] At the same time we can as yet lay down no general principle upon which this jurisdiction is based. It is not as yet entirely the jurisdiction of a lord over his tenants. It is still regarded as somewhat of a personal matter. "Nec sequitur socna regis data maneria, sed magis ex personis."[2] A man may be commended to one lord and be under the soke of another.[3]

The second set of these causes operated from above.

The state for many reasons finds it convenient to connect landownership with jurisdiction.

The first need of the state is for a military force which can be mobilized. A responsible landowner who owns five hides has something to forfeit if he makes default. A person who has this amount of land is qualified to be independent—to be a Thegn. The land is divided into "five hide units" the owners of which are responsible. It was a system which wanted little but a change of names to turn it into a system of knights' fees and military tenure.[4]

In the second place "the lordless men of whom no law can be got"[5] are always a difficulty to the state. The lord is made responsible for his dependents. He must produce them in court if they are wanted. This does not mean that he has the power to hold a court for them. This, in theory at least, depends upon express grant.[6]

In the third place an inexpensive method of collecting the taxes is a want constantly felt by the state. We have seen how heavy a tax was the Danegeld. It was an advantage at once to the state and to the small taxpayer to get the great lord to do the work of collection. "The small folk will gladly accept any scheme that will keep the tax collector from their doors even though they purchase their relief by onerous promises of rents and services. The great men again may find advantage in such bargains. They want

[1] xx 2 "Archiepiscopi, episcopi, comites, et aliæ potestates in terris propriis potestatis suae sacam et socnam habent, tol et theam et infongentheaf; in ceteris vero, per empcionem, vel cambicionem, vel quoquo modo perquisitis, socam et sacam habent, in causis omnibus et hallemotis pertinentibus, super suos et in suo et aliquando super alterius homines." [2] Leg. Henr. xix.

[3] Leg. Henr. xx 2; Domesday Book and Beyond 100.

[4] Domesday Book and Beyond 157-160; Stubbs, Sel. Ch. 65.

[5] Laws of Athelstan, (Sel. Ch. 66).

[6] Domesday Book and Beyond 285, 286.

periodical rents and services and in order to obtain them will accept a certain responsibility for occasional taxes."[1] According to the laws of Cnut only four days of grace were given for payment.[2] After these had passed the man who paid the tax could take the land. We have here a cause which clearly tends to make the lord a landlord.

It is to this cause that Professor Maitland ascribes the "manerium" of Domesday. The terms manerium, mansio, or halla mean originally a house.[3] The term manerium is given a further meaning and becomes a house against which geld is charged.[4] Thus we read of persons who hold two hides or more or less as and for a manerium. These maneria were of all sizes. The manor of Taunton was worth £154: 1. We read of a manor worth only 15 pence.[5] In either case it is a holding separately responsible for geld.

All these causes operated upon the vague conceptions of Anglo-Saxon law, and reduced to hopeless confusion the scheme of the communal courts. The question who in any given case has sac and soc must often have been an insoluble problem without the ready aid of physical force. "Pactum enim legem vincit" say the laws of Henry I.;[6] and the sentence might almost be taken as the motto of the period. It was the work of the Norman and Angevin kings first to classify and then to subdue this wild conflict of laws.

(ii) The effect of the Norman Conquest.

England as the result of the Conquest gained a strong line of capable kings. This is the most important of the immediate effects of the Conquest. The reign of Stephen shows us how much depended upon the personality of the king. That personality alone prevented mere anarchy. It is not until the central power is permanently organised by the creation of administrative and judicial bodies that the personality of the king ceases to have this paramount importance. In the first instance it directed and modified all the other effects which flowed from the Conquest.

The Norman lawyers introduced a clear notion of tenure and of some of the consequences of tenure. The Normans had attained a feudal system by the road of personal commendation, by grants of benefices by the king to his

[1] Domesday Book and Beyond 122. Possibly if the lord will assume this responsibility the geld charged on his land will be relieved. [2] Ibid 55, 56. [3] Ibid 108, 109. Cp. L.Q.R. v. 114, 115 for later instances of the use of manerium in this sense; a 14th century record there cited talks of the time, "quando Dominus Episcopus faciet domum de novo *vel reparari faciet manerium suum de Stokton.*" [4] Ibid 120, 121. [5] Ibid 110-119. [6] xlix 5.

dependents, and by grants of immunities.[1] The resulting condition of affairs in Normandy was in many cases similar to the condition of affairs in England. Often it must have seemed to them that names only required to be changed. But undoubtedly they had attained a clearer conception of tenure, and their feudal system was more entirely based upon it. Land is conceived of as held not merely *sub*, under a lord, but *de*, of a lord. "*Sub* lays stress on the lord's power which may well be of a personal or justiciary rather than of a proprietary kind, while *de* imparts a theory about the origin of the tenure; it makes the tenant's rights look like derivative rights:—it is supposed that he gets his land from his lord."[2] One of the consequences of tenure is that the lord has a right to hold a court for his tenants. This theory is explicitly stated in the laws of Henry I. "Omni domino licet submonire hominem suum, ut ei sit ad rectum in curia sua; et si residens est ad remotius manerium ejusdem honoris unde tenet, ibit ad placitum, si dominus suus submoneat eum."[3] The refusal of an abbot of Peterborough and a prior of Dunstable to allow their freeholders to hold a court for their tenants was said to be contrary to law.[4] The lord's court for his tenants is frequently mentioned in Glanvil.[5]

This might well have led to a growth of feudal courts one above the other, and, ultimately, to the growth of compact feudal provinces. Thus the Bishop of Ely held a court for his manor at Littleport. But difficult cases and complaints of insufficient justice were heard in his council.[6] Many lords held a central court to which their more important tenants owed suit.[7] But compact feudal provinces were not formerly in England; and this is due in part to the circumstances of the Conquest; but chiefly to the energy and foresight of the Norman and Angevin kings. Successive rebellions of the English led to successive confiscations. The dominions of the Norman barons were therefore scattered. Except the earldom of Chester and the bishopric of Durham no great provinces were created.[8] The Norman and Angevin kings made good use of their position as the successors of Edward the Confessor. They used the organization of the com-

[1] Stubbs, C.H. i 286-292. [2] Domesday Book and Beyond 154. [3] lv 1.
[4] Select Pleas in Manorial Courts (S.S.) xlv.
[5] ii 8; ix 1; ix 11; xii 2-7. [6] The Court Baron (S.S.) 111.
[7] The abbots of Ramsey, Gloucester, St Albans, St Edmunds, Select Pleas in Manorial Courts xlv, xlvi; Madox, Exchequer i 107-112.
[8] Stubbs, C.H. i 307-311. Kent was for a few years a county Palatine under William's brother Odo; Shropshire also, till Henry I. drove out Robert of Belesme.

munal courts, as they used Anglo-Saxon soldiers to keep under their disorderly barons. Thus, although the distinctly feudal conception of jurisdiction dependent on tenure is introduced, it operated under such limitations that, except in the case of the Palatine counties, it never attained great proportions.

What is true of jurisdiction dependent on tenure is true also of the special grants conferring various franchises. Grants which have been made by the Anglo-Saxon kings are in many cases recognised and confirmed by the Norman and Angevin kings. It is chiefly in the Palatine counties that the franchises attain any great importance.[1] To take one old instance of Durham. "If any other argument were required to prove that William the Conqueror considered the Palatinate of Durham as a dominion entirely separate from those of the crown, it is the fact that in his great territorial survey he entirely omitted all notice of the Palatinate."[2] We have charters of Henry I.'s and Stephen's reigns confirming its privileges; and even Henry II., when he sent his justices into the Palatinate, admitted that he did so only by the licence of the bishop, and that this special occasion formed no precedent.[3] The earl of Chester had similar rights—"he was in fact a feudal sovereign of Cheshire as the king was in Normandy."[4] Madox gives us a list of fines paid for franchises during this period.[5] Some of them take the form of a confirmation of existing franchises, or are grants in the old Saxon words.[6] These words

[1] We do sometimes meet with very extensive franchises, Rot. Cur. Reg. (Rec. Com.) i, xxxi, xxxii 426. In 1199 William de Braosa says that neither king, sheriff, nor justice have any right to enter his liberty. In 1302 William de Braosa lord of Gower said that he had his chancellor and Chancery and his seal, judgment of life and death, cognisance of all pleas, whether of the crown or not, arising within the liberty; cp. ibid ii 6, 10. The Bishop of Ely deduced the title to his franchise from Edgar, through charters of Ed. the Confessor, William I., and Henry I, Select Pleas of the Crown (S.S.) case 98.

[2] Registrum Dunelmense (R.S.) i, lxvii, lxvii. It is recorded moreover that neither king nor earl had any rights over the lands of St Cuthbert in Yorkshire. Domesday Book i 298 b.

[3] Registrum Dunelmense (R.S.) i, lxvii, "Sciatis quod consilio Baronum meorum, et Episcopi Dunelmensis licencia, mitto hac vice in terram Sancti Cuthberti justiciam meam, quæ videat ut fiat justicia, secundum assisam meam, de latronibus et murdratoribus, et roboratoribus; non quia velim ut trahatur in consuetudinem tempore meo, vel hæredum meorum, sed ad tempus hoc facio, pro prædicta necessitate." Four other charters of the same king confirm the bishop's franchises. Lapsley, County Palatine of Durham 126. [4] Stubbs, C.H. i 411.

[5] Exchequer i 397-424. For grants of freedom from taxation see Dialogus de Scaccario (Sel. Ch.) 222.

[6] A grant to the Prior and monks of Worcester that they have within their four manors "Socam et Sacam et Tol et Team et Infangenethief cum judiciis Aquæ et Ignis et Furcarum et Ferri et cum quietantiis aliarum Libertatum sicut continetur in Cartis Regum quas inde habent," cited Madox i 408.

no doubt once conferred a wide jurisdiction, but they are gradually becoming meaningless. In other cases franchises are granted in newer technical terms. They are usually of the humbler class. The most usual is the view of frankpledge. We have also grants of freedom from suit to the hundred and shire courts and from all payments to the sheriff.[1] Sometimes a man is allowed to tallage his manor as the king tallages his demesnes.[2] In fact, just as considerations of space and distance limited the purely feudal jurisdiction, so it limited the jurisdiction exercised by virtue of these special grants. The average baron had the opportunity to exercise only the humbler class of franchises. It was franchises of this kind which were least able to maintain themselves against the growing jurisdiction of the king's court.

We begin in this period to be able to distinguish two classes of private jurisdiction (1) A jurisdiction depending upon tenure—the distinctly feudal jurisdiction. (2) A jurisdiction depending upon royal grant or confirmation. Such jurisdiction is probably often usurped. But the theory is growing that unless some kind of royal grant is shown it is an usurpation. This classification has hardly begun to appear in the reigns of the Norman kings. It emerges more clearly in the reign of Henry II.

We cannot as yet distinguish what was destined to become in later times the commonest form of private jurisdiction—the manorial jurisdiction. The manerium of Domesday is, as we have seen, a holding separately rated to geld. The term is, however, as a result of the Conquest, tending to take another meaning. The manor is tending to assume the external, as distinct from the jurisdictional qualities which belong to it in later law.[3]

The Conquest was disastrous in its results to the poorer classes.[4] Their new lords were able to exact from them pretty much what they pleased. In Henry II.'s time, it is true, the humblest freeholder was protected by the king's court. But the villein held merely at the will of the lord. The lord was the person responsible to the government for

[1] Grant to the abbot of Ramsey, "quod ipse et dominica sua quieta sint de sectis Schirarum et hundredorum, et de auxiliis Vicecomitum, et pro habendo franco pledgio in Curia sua," cited Madox i 404.

[2] Ibid 418, 419.

[3] L.Q.R. v 114, 115; Bracton ff. 212, 434.

[4] Dialogus de Scaccario I. 10 (Sel. Ch. 202); Bracton, f. 7, says "Fuerunt etiam in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines, et cum per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendo inde opera servilia."

military service and feudal dues. With responsibility comes power: the lord comes to be regarded as the owner of the soil.[1] That part of the soil which he cultivates as an economic whole is said to be his manor. Thus, speaking of the 13th century, Professor Maitland says, "The delimitation of one manor from other manors of the same lord is a matter of convenience, a matter of account. One manor may become two, two may become one, as the lord chooses to have his accounts kept, his rents collected, his produce garnered."[2]

Such manors are naturally of all sizes; and the extremely small "maneriola" which we sometimes meet, show clearly that the word manor has not yet attained its later technical meaning.[3] They may consist merely of a few villeins cultivating their lord's land, to which, in accordance with the agricultural economy of the time, certain common land is annexed. Or, the lord may live on the manor with lands of his own in demesne, having both freehold and villein tenants with certain rights of common in the lord's waste. It is such a manor as this that becomes the typical manor of later law.[4] By the process of borrowing certain ideas from the feudal principle the lord will get not merely an estate, but the right to hold for that estate a court or courts. But it is not till the feudal principle has been reduced to a humbler place than it occupies in the reigns of the Norman and Angevin kings that this result is reached.

(3) The Curia Regis.

The term "Curia Regis" means (i) the place where the king resided attended by the chief officials of his court and

[1] India offers a curious parallel. When a new province is settled the question arises who is to be made responsible for the land revenue. In determining this the political and social constitution of the province is determined. "Do you on entering on the settlement of a province find that a peasant proprietary has been displaced by an oligarchy of usurpers, and do you think it expedient to take the government dues from the once oppressed yeomen? The result is the immediate decline . . . of the class above them. . . . Do you, reversing this policy, arrange that the superior holder shall be answerable to Government? You find that you have created *a landed aristocracy* which has no parallel in wealth or power *except the proprietors of English soil.*" There is no assumption that new proprietary powers are conferred. "But in the vague and floating order of primitive societies the mere definition of a right immensely increases its strength. . . . All agrarian rights, whether superior or subordinate to those of the person held responsible to Government, have a steady tendency to decay," Maine, Village Communities 149-151.

[2] P. and M. i 593; Select Pleas in Manorial Courts (S.S.) xxxix, xl. The word was used like the word "estate" is nowadays used by laymen. A trace of this old meaning of the term manor is found in the fact that rights of common were generally described in legal proceedings as being attached to land not in a manor but in a "vill"; similarly juries were summoned from vills, Williams, Commons 44-49.

[3] P. and M. i 591.

[4] Ibid 584, 585.

household; (ii) the supreme central court of the country where the business of the government in all its branches was transacted.[1] The names of the officials, the forms of the legal proceedings, and the terms used to describe them were Norman.[2] It was, in fact, a strong central court of this nature which was wanting to the Anglo-Saxon constitution.

The king had in Anglo-Saxon times a certain exclusive jurisdiction. The laws of Cnut[3] and of Henry I. give us a list of the pleas of the crown.[4] Contempt of the king is a specified offence.[5] Certain places like the royal streets,[6] certain persons like the king's thegns are under the king's immediate jurisdiction.[7] The king has his special peace.[8] But the county, the hundred and the greater lords have also their peace[9] and their jurisdiction.

Under the Norman kings we get a strong central court but no very distinct separation into departments of government. The Exchequer, it is true, in Henry I.'s reign seems to be beginning to have a distinct organisation. But the Exchequer was staffed by the same body of officials who regularly took their places in the Curia Regis.[10] At this period it is the personality of the king which gives to the Curia Regis its power as the reign of Stephen clearly shows. The laws of Henry I. recognise the law of the king's court as supreme all over the country. It constitutes a fourth species of law, superior to the tribal customs of the West Saxons, the Mercians, and the Danes in its stability and power.[11] But we can see from these same laws that it has not yet attained either a definite jurisdiction or a definite organization.

The legal reforms of Henry II. gave to the Curia Regis a more definite jurisdiction; and, as a consequence we begin to see at the end of this period the beginnings of a more definite organization of the powers of the state.

The actual text of the laws which thus systematized and enlarged the powers of the Curia Regis have not come down

[1] Madox, i 2, 82.
[2] Ibid i 180-185.
[3] Laws of Cnut (Secular), Thorpe i 383.
[4] Leg. Henr. x, xix.
[5] Ibid xiii, xxxv, liii 1; laws of William I. xxvi. A.-S. Overseunessa or Oferhyrnes.
[6] Leg. Henr. xvi, lxxx 1, 2, 7.
[7] Laws of Ethelred c. 11 (Sel. Ch. 73).
[8] Leg. Henr. lii 3; laws of William I. ii.
[9] Laws of Ethelred iii 1; Leg. Henr. lxxxi 1, 2. Even in Bracton's day (f. 154b) it was possible to talk of the peace of the sheriff.
[10] Below 24-26.
[11] Leg. Henr. vi 1, "Legis eciam Anglice trina est partitio . . . preter tremendum regie magistatis titislamus (?) imperium." Ibid ix 9, "Legis eciam Anglice trina est partitio; et ad eandem distanciam supersunt regis placita curiæ, quæ usus et consuetudines suas una semper immobilitate servat ubique."

to us. We have an account of some few of them preserved by contemporary chroniclers. In the Dialogus de Scaccario[1] we have a minute description of the working of the Exchequer, which, as we have said, was intimately allied with the Curia Regis. In Glanvil's treatise we have a description of the judicial work of the court in the last part of the period. Many of Henry's reforms may have consisted of verbal instructions to his officials. A new writ or a new mode of procedure of large importance in the later history of the law may have had its origin in this informal manner.[2]

The following is a list of the chief legislative acts which are of importance to legal history. (1) The Constitutions of Clarendon (1164).[3] They were an attempt to settle the matters in dispute between church and state, and the limits of the jurisdiction of the lay and the ecclesiastical courts. (2) The Assize of Clarendon (1166).[4] This is a set of instructions to the itinerant justices and sheriffs with reference to their duties and their jurisdiction. (3) The Inquest of Sheriffs (1170).[5] This directs a general inquiry into the methods in which the sheriffs had been conducting the local government of the country. (4) The Assize of Northampton (1176)[6] was a reinactment and enlargement of the Assize of Clarendon. (5) The Grand Assize[7] provided a new method for the trial of actions relating to the ownership of land. (6) The Assize[8] Utrum provided for the trial of the question whether land is a lay fee or held in frankalmoigne. (7) The Possessory Assizes.[9] The Assize of novel disseisin provided for the trial of the question whether A has disturbed B's seisin. The Assize of mort d'ancestre provided for the trial of a dispute as to who is the heir of the person last seised of a given estate of freehold. The Assize of darrein presentment provided for the trial of a dispute as to who was last seised of the right to present to a vacant living. In all these assizes the trial was by jury.[10] In all these assizes the proceedings were by royal writ addressed either to the justices of the Curia Regis, to the sheriff, or to the lord of whom the land was held.

The result is that the Curia Regis draws to itself jurisdiction over criminal cases, and over actions relating to the ownership or possession of land held by free tenure. The

[1] Stubbs, Sel. Ch. 168-248; Madox, ii 349-452.
[2] P. and M. i 115, 116.
[3] Sel. Ch. 135.
[4] Ibid 140.
[5] Ibid 147.
[6] Ibid 150.
[7] Glanvil ii. 7, 10, 12, 14, 16, 17; Sel. Ch. 161, 162; P. and M. 125, 126; as to date, the Athenæum 1899, 113; App. I.
[8] P. and M. i 123, 124; App. II.
[9] P. and M. i 124-128; App. III.
[10] For distinctions between trial by jury and assize see below, 151, 152.

pleas of the crown are now no longer described by the formless list which we find in the laws of Henry I. The opening words of Glanvil's treatise contain a classification which would have been impossible at the beginning of Henry II.'s reign. "Placitorum," he says, "aliud est criminale, aliud civile. Item placitorum criminalium, aliud pertinet ad coronam domini regis, aliud ad vicecomitem."[1] Thus the criminal pleas of the crown are treason, concealment of treasure trove, homicide, arson, robbery, rape, forgery, "et si quæ sunt similia." Theft is matter for the sheriff. Riots or assaults are tried by the sheriff only "per defectum dominorum," unless there is also a charge "de pace domini regis infracta."[2] The civil pleas of the crown determined in the Curia Regis are pleas concerning baronies, the advowsons of churches, status, dower, the non-observance of a fine made in the Curia Regis, homage, reliefs, purprestres, debts of the laity, ownership, and possession.[3] The civil pleas of the crown determined by the sheriff are the ownership of freehold where the lord has made default, and the ownership of villeins.[4] The sheriff hears these pleas of the crown "per breve domini regis." In the laws of Henry I. the sheriff is vaguely stated to be unable to hear pleas of the crown "sine diffinitis prelocucionibus,"[5] but no attempt is made to describe the form which these royal mandates may take. Glanvil always gives the text of the various writs by which these proceedings are begun. We can see from Glanvil's book that the jurisdiction of the Curia Regis is an elastic jurisdiction. The register of original writs is constantly expanding. "As yet the king is no mere vendor, he is a manufacturer and can make goods to order; the day has not come when the invention of new writs will be hampered by the claims of a parliament; but still in Glanvil's day the *officina justitiæ* has already a considerable store of ready made wares and English law is already taking the form of a commentary upon writs."[6]

Some organization of the Curia Regis becomes necessary. For some years after the accession of Henry I. the Curia Regis does not begin to split into departments. What division there is is rather a division between officials than between departments. The different members of the king's household—the justices, the chancellor, the treasurer, the

[1] i 1; xiv 8; Bigelow 285, carrying off turf "vi et armis et robberia et nequitia et in pacem domini regis," is ruled to be a plea of the crown.

[2] i 2 and xiv 1-7. [3] i 3. For writs see App. I-V.

[4] i 4. He might be ordered to hear other cases by writ of Justicies (App. VI), and cases heard by the sheriff might be called before the Curia Regis by writ of Pone (App. VII). Glanvil xii 9-20.

[5] Leg. Henr. x 3. [6] P. and M. i 130; Bigelow xxviii.

chamberlain, the constable and the marshal — distribute among themselves the powers of government.[1] The court itself is now a large court composed of all the greater vassals of the crown and the leading officials of the state, now a small executive body, now a law court consisting of a few royal judges. Sometimes the king himself, sometimes the members of the Curia or of the Exchequer travel over the country. But any court whether held before the king himself or before his justices is Curia Regis—the court which administers royal justice as distinct from the justice administered by the communal or the feudal courts.[2]

At the end of this period we find that the court is beginning to split into various divisions in which we can discern the judicial system of the future. This process of disintegration we shall trace under the following heads:—

i. The Curia Regis and the Commune Concilium.
ii. The Exchequer.
iii. The Itinerant Justices.
iv. The Court of Common Pleas.

i. The Curia Regis and the Commune Concilium. How far the Curia Regis is a continuance of the Anglo-Saxon Witan is rather a matter for argument or belief than a matter capable of certain determination.[3] William was king in England and Duke of Normandy. Certain Anglo-Saxon institutions he undoubtedly maintained. This feudal council may have had some of the characteristics of a Witan. But we have seen that after the Conquest the principles and consequences of tenure were more accurately and universally applied, and that a strong central court was not part of the Anglo-Saxon institutions. The king no doubt could, and did summon what advisers he chose. But we find that the Curia Regis tends more and more to assume the character of a feudal council; and in the reign of John the Commune Concilium is in theory composed simply of tenants in chief of the crown—of persons qualified by virtue of tenure.[4]

The constituent parts of any given assembly of the Curia Regis were various. It comprises sometimes the greater nobility, the bishops, the abbots, and all the great men of the kingdom.[5] It may sometimes have consisted

[1] For a list of officials, see Madox chap. ii.; Stubbs, C.H. i 389-403.
[2] P. and M. i 132.
[3] Madox, i 92, 93; Stubbs, C.H. i 403-405; Pike, H. of L. 22.
[4] Magna Carta, c. 14; below 28 n. 5.
[5] E.g. The assembly which enquired into the customs of the kingdom for the purpose of the Constitutions of Clarendon, Sel. Ch. 137; Stephen, H.C.L. i 85-87.

of a small body of officials. Such for instance was probably the assembly which passed wakeful nights in drawing up the assize of novel disseisin.[1] But of such assemblies we hear comparatively little in the chronicles. The court was always held in the presence of the king. It followed him in his travels over the country; and litigants were sometimes obliged to cross the seas when he was in his continental dominions.[2] We have several accounts of the way in which Henry was wont to hear cases in person.[3] He was as able a lawyer as any of his justices. His ceaseless activity kept them up to their work. Mapes tell us that he had complimented Glanvil on the swiftness and justice of the Curia Regis. "Certe," said Glanvil, "nos hic longe velocius causas decidimus quam in ecclesiis episcopi vestri." Tum ego, "Verum est; sed si rex noster tam remotus esset a vobis, quam ab episcopis est papa, vos æque lente crederem." Ipse vero risit.[4]

The official members of the Curia were, as we have said, the great officers of the king's household. The officials who have the most importance in legal history are the Justiciar, the Chancellor, and the Justices.

The justiciar in this period is the first official after the king. He presided both in the Curia Regis and the Exchequer.[5] The frequent absences of the king made a regent of this kind necessary. The king, when he went abroad, was wont to issue writs de ultra mare, which seem to have defined the authority of the justiciar.[6] By virtue of this authority the justiciar issued writs in his own name. William I. appointed great nobles to this office. In 1067 his brother, Odo of Bayeaux, was justiciar. Under William II. "the office became a permanent one, and included the direction of the whole judicial and financial arrangements of the kingdom."[7] To entrust such an office to the great nobles was clearly impolitic. With Ranulf Flambard we get

[1] Bracton f. 164 b.

[2] See the account of the litigation of Richard of Anesty (1158-1163) Bigelow 311; P. and M. i 137, 138; Madox i 87, 88; Stephen, H.C.L. i 88-90.

[3] Bigelow 212, 214. In the case of Abbot Odo (ibid 221), the abbot got from the king's court the renewal of an old charter. The king suppresses one clause, and inserts another of his own making; "nec dedignatus est inclitus princeps super prædicta clausula reddere rationem." In the case of the Archbishop of Canterbury and the Abbot of St Edmunds (ibid 239) the conflicting charters produced were too much for the king, "rex . . . indignans surrexit et recedendo dixit: qui potest capere capiat: et sic res capit dilacionem."

[4] Mapes, De Nugis Curialium (C.S.) 241; see his description of Henry, ibid 226-228.

[5] Madox i 201. [6] Ibid 84, 85. [7] Stubbs, C.H. i 393.

the first of the class of professional justiciars.[1] Under Henry I. Roger of Salisbury remodelled and organised the Curia Regis and the Exchequer.[2] His great nephew Richard, Bishop of London,[3] the Treasurer, shows us in his Dialogus de Scaccario how far this work of organization had gone. The great justiciars of Henry II.'s reign were Luci[4] and Glanvil. The great justiciars of Richard's reign were Hubert Walter[5] and Geoffrey Fitz-Peter.[6] It is largely to their efforts that we owe the detailed working out, and the practical success of Henry's reforms. They may be reckoned among the founders of the common law.

The chancellor[7] was originally the chief of the king's chaplains. He sealed and supervised the issue of royal charters and the writs by which proceedings in the Curia Regis were begun. He conducted the whole of the king's correspondence and he kept his accounts. He was "the secretary of state for all departments."[8] He acted with the other officials of the Curia Regis and the Exchequer in their judicial business. At the beginning of Henry II.'s reign we find him holding pleas in the county of Kent; at various times he acts as an itinerant justice. The increase of the business of the Curia Regis increased the dignity of the chancellor and necessitated the employment of a staff of clerks. The chancellor thus became the head of a department—the Chancery—which continued to issue original as distinct from judicial writs. From the reign of John onwards we get the Rolls of the Chancery.[9] The chancellor is not and will not be for some time the head of a court. Even when he attains this position he does not cease to be an important member of the executive government.

There were certain persons "associated in judicature" with the justiciar who are styled "justitiæ in Curia Regis."[10] They are mentioned in the reign of Stephen, and many times in the reign of Henry II. Thus in 1179, Hoveden says that the king held his council at Windsor and by the advice of the archbishops, bishops, earls, and barons he divided

[1] Stubbs, C.H. i 393-395.

[2] Originally a poor priest of Caen, he had attracted Henry's notice "by his expeditious way of celebrating Divine service," Stubbs, C.H. i 395.

[3] P. and M. i 140.

[4] Stubbs, C.H. i 548.

[5] Stubbs, C.H. i 564, 565, 567.

[6] Ibid 574, 588.

[7] Madox i 60-76.

[8] Stubbs, C.H. i 399.

[9] Madox ii 254; Select Pleas of the Crown (S.S.) viii; Close Rolls (Rec. Comm.) introd. vii, viii. It is thought that the separate rolls of chancery date from the time (1194) when Longchamp ceased to be justiciar, but continued to be chancellor.

[10] Madox i 93-95; Stubbs, C.H. i 439, 440.

England into four parts and appointed justices for each division.[1] They are often the same persons as the Barons of the Exchequer; for, in those days, royal commissioners were called by either name.[2] They either sat in the Curia Regis or travelled round the country when commissioned by the king. They were often members of the king's household. The term justices of the Curia Regis was in fact a general term to describe the royal officials.

The work of the Curia Regis was legislative, administrative and judicial.

With its counsel and consent William I. amended the laws of Edward the Confessor. The same counsel and consent is mentioned by Henry I. in his charter.[3] The assize of Clarendon is made "de assensu archiepiscoporum, episcoporum, abbatum, comitum, baronum totius Angliæ."[4] It is similarly a party to the Constitutions of Clarendon, and to the ordinance of the Saladin tithe.[5] In the reign of Richard I. we have recorded a discussion in the Curia.[6] But it would be a mistake to suppose that the Curia had any real power to oppose the crown. The crown, however, was sensible that its counsel and consent added weight to any measure of permanent importance.

We can see this fact, perhaps more clearly, in the varied administrative measures to which the Curia Regis was a party. Henry I. appoints to bishoprics in a court at Westminster in 1107.[7] In a council at Oxford (1137) Stephen arrested Roger bishop of Salisbury, Alexander bishop of Lincoln, and his nephew Roger the chancellor—a measure which was the signal for the outbreak of civil war.[8] It discusses the coronation of Henry II.'s son, the marriage of Henry II.'s daughter, questions of peace and war, all questions in short relative to the state of the kingdom.[9]

It is in judicial matters that the Curia Regis received in Henry II.'s reign its greatest extension of jurisdiction.

From the early days of the Norman dynasty it had been a court for great men and great causes, whether criminal or civil.

[1] Madox i 94, n. a. "Godefridus de Luci, Johannes Cumin, Hugo de Gaerst, Ranulfus de Glanvilla, Willelmus de Bendinges, Alanus de Furnellis. Isti sex sunt Justitiæ in Curia Regis constituti ad audiendum clamores populi: et eis assignatæ erant subscriptæ provinciæ, Notinghamsire, Derebisire, Everwicsire, Northumberland, Westmerland, Cumberland inter Rible et Merese, Lancastre."

[2] Ibid 141. The Domesday commissioners are styled Barones, Sel. Ch. 86. Gesta Henrici (R.S.) ii, lxxxiv, lxxxv.

[3] Stubbs, C.H. i 419.

[4] Sel. Ch. 143.

[5] Ibid 137; Madox i 20, 21.

[6] Sel. Ch. 255, 256.

[7] Madox i 10.

[8] Ibid 14.

[9] Ibid 17, 18; Stubbs, C.H. i 640, 641.

In 1072 William heard the dispute between the Archbishops of Canterbury and York touching the primacy.[1] In 1088 the Bishop of Durham was tried for treason.[2] In 1165 Henry I. called upon Thomas à Becket to answer before him for a wrong done to John his Marshal, and the barons of the king's court adjudged the archbishop to be in the king's mercy.[3] In 1177 the Curia Regis had before them the Kings of Navarre and Castile who had submitted their disputes to Henry; and, says the chronicler, "Comites et Barones Regalis Curiæ Angliæ adjudicaverunt plenariam utrique parti . . . fieri restitutionem."[4]

Under Henry II. it is also a tribunal where all classes of cases are tried. The king or his justices order cases to be heard there.[5] The privilege of being sued only in the Curia Regis was occasionally granted to certain persons.[6] Suitors paid money to the king to have their cases tried there. The popularity of the court is attested by the number of fines which litigants paid for writs, for pleas, for trials, for judgment, for expedition, or for delay.[7] The Court itself begins to keep plea rolls. The oldest rolls come from Richard I.'s reign.[8] But those rolls appear to refer to still older rolls of Henry II.'s reign.[9] The collection of the feet of fines, i.e. the record of actions begun and compromised in the king's court, dates in a continuous series from 7 Richard I. We can see from these rolls that the most usual cases were cases concerning the ownership or possession of land. Personal actions are rare.[10] But we can see that often the matter in dispute is small, and that the quantity of business done is great.[11]

The procedure of the court in the more important cases is still that of the older courts. The court itself gives judgment. The king demands the judgment of the court.

[1] Madox i 6.

[2] Stubbs, C.H. i 420, 498, 499. For other cases see Bigelow 2, 4, 11, 12, 69, 291.

[3] Bigelow 212.

[4] Madox i 18, 19; Sel. Ch. 130, 131.

[5] Bigelow 176.

[6] Bigelow 156 (a writ of Stephen to the abbot of Abingdon); Madox i 116-119; Bracton f. 411 b, the Templars and Hospitallers and "plures alii."

[7] Bigelow 268, 269, 276, 277; Madox, chap. xii; The number of these payments, as Madox points out, explains cap. 40 of Magna Carta, "Nulli vendemus, nulli negabimus aut differemus, rectum aut justiciam." The clause had its effect; the fines paid for writs and process of law were more moderate after Magna Carta; and the actual delaying or denial of right on payment of money gradually ceased.

[8] Select Pleas of the Crown (S.S.) vii, viii.

[9] Ibid xxvi, xxvii, note A; The entry may refer to the 17th or the 27th year of Henry II.

[10] Select Civil Pleas (S.S.) xiii, xiv.

[11] Rot. Cur. Reg. (Rec. Com.) i, vi.

He does not give it himself.[1] In 1194, on the second day of the council held at Nottingham, Richard I. "petiit sibi fieri judicium de comite Johanne fratre suo."[2] But the introduction of the newer methods of trial by assize or by jury before royal justices is tending to supersede the older methods of trial. We can see from Magna Carta that the barons fear that they will be deprived of the older method of trial, the judicium parium, that they will be tried not by the court of their pares but by royal and professional justices.[3] The clause of Magna Carta was in one case effectual. The trial of a peer before the House of Lords is perhaps the one survival of the judicium parium; for there each member of the House decides not merely upon the law but also upon the facts.[4]

But this clause of Magna Carta perhaps illustrates the fact that there is a growing tendency for the Curia Regis to split into two fragments—a deliberative council and a court staffed by professional judges. It is quite clear that one court cannot deal with so varied a mass of business. Magna Carta shows us in another clause that the commune concilium, which meets occasionally for purposes of taxation, is already regarded as something different from the court of royal justices which hears pleas coram rege.[5] But the day has not yet come when this commune concilium will develop into a Parliament, and when the court held coram rege will permanently divide itself into a law court and a council. The day when from that council will spring a court of equity, a court of Star Chamber, and a judicial committee is still more distant.

ii. The Exchequer.

The Dialogus de Scaccario shows us that the department of the Exchequer is already in a manner distinct from the Curia Regis. The name is derived from the chequered cloth figured with squares like a chessboard, which was laid on the table in the court of Exchequer; "which custom," says Madox, "continues to this day."[6] This suggested to the writer of the Dialogus the analogy between the proceedings at the Exchequer and a game of chess. Both have their fixed laws; and

[1] Bigelow 212.

[2] Sel. Ch. 253; above 5, 6.

[3] Cap. 39, "Nullus liber homo capiatur . . . nisi per legale judicium parium suorum vel per legem terræ." P. and M. i 152 n. 2; Bracton f. 119 b.

[4] Select Pleas in Manorial Courts (S.S.) lxv-lxvii.

[5] Cap. 14, "Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus prædictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per literas nostros; et præterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite."

[6] i 160 (1708).

"sicut in lusili, pugna committitur inter reges: sic in hoc inter duos principaliter conflictus est et pugna committitur, thesaurarium scilicet et vicecomitem qui assidet ad compotum; residentibus aliis tanquam judicibus ut videant et judicent."[1]

There was an Exchequer of a similar kind in Normandy.[2] But the Dialogus[3] tells us that they differed from one another in several respects, and that there were some who thought that the Exchequer in England could be traced back to Anglo-Saxon times. The writer does not come to any absolute decision on this point. Probably here, as in other respects, Norman institutions were introduced and adapted to their new environment. As Stubbs points out, if there was an English Exchequer it was organized by Norman ministers; and, as a consequence "The Treasury of Caen could lend an abbot to the Exchequer of Westminster, or the Exchequer of Westminster could lend a baron to revise the accounts of Caen."[4]

The Exchequer, by its system of audit and account, exercised a general supervision over the local government of the country. Twice a year, at Easter and Michaelmas, the sheriff and other persons who had received money on behalf of the crown appeared before the board.[5] A general view of the whole machinery of local government was thus obtained.

We have seen that the great officials of the Curia Regis all take their places in the Exchequer. The justices of the Curia Regis are the Barones Scaccarii.[6] They have numerous privileges and exemptions; but these privileges have not as yet developed into the exclusive jurisdiction of the Exchequer over its own officials.[7] The Chancellor performed part of his duties at the Exchequer since the great seal was kept there. Charters, the original writs of Liberate, Allocate, Computate, and Perdono, and writs of summons against the king's debtors issued from the Chancery in the Exchequer.[8] We have seen that at the beginning of John's

[1] I. i (Sel. Ch. 171). [2] Madox i 162-177.

[3] I. iv (Sel. Ch. 176, 177); Stubbs, C.H. i 427 n. 4; Madox i 190, 191, ii 3-5, mentions certain subordinate Exchequers in different parts of the country. They do not seem to have any permanent importance.

[4] Stubbs, C.H. i 497.

[5] There were two divisions—the upper Exchequer of account and the lower Exchequer of receipt; Stubbs, C.H. i 429. [6] Above 26.

[7] Dialogus I. viii (Sel. Ch. 196-200).

[8] Madox, Exchequer i 206, 214; ii 254. The writ of Liberate authorized the issue of money; the writ of Allocate or Computate certain allowances or discounts to certain accountants; the writ of Perdono released the king's claim to certain payments.

reign the Chancery begins to keep separate rolls; and estreats, or extracts from them, were, when required, sent into the Exchequer. The Justiciar, as we have seen, presided at the Exchequer. The Treasurer is an official distinct from the other Barons. He keeps a separate roll.[1] He does not preside at the Exchequer till after the Justiciar has ceased to be a regular attendant there.[2]

The Exchequer at this period heard not only the pleas which arose out of the financial business of the board, but, as we might expect from its close connection with the Curia Regis, pleas of all kinds. Fines were acknowledged there. Real actions, assizes, and pleas of the crown were heard there.[3] Ordinary business of state was also transacted there.[4]

It is clear that the Exchequer is both the Treasury and the law court of later days. It both collects the taxes and tries cases. Perhaps we may see some sign of the coming separation in the fact that the Barons are the persons called upon to decide knotty points in the upper Exchequer, and that for this purpose they sometimes sit apart from the place where the general business is done.[5]

From the end of Richard I.'s reign up till the latter part of Edward I.'s reign there was in existence a separate branch of the Exchequer known as the Exchequer of the Jews.[6]

The Jew was an alien both to church and state. He was regarded as a species of res nullius. But he was valuable for his acquisitive capacity; and for that reason the crown took him under its protection. "As they fleeced the subjects of the realm so the king fleeced them."[7] Jewish communities were allowed to settle in the more important towns. Under Henry II., Richard and John they acquired a certain freedom of trade and a certain measure of autonomy. They were allowed to choose their Chief Rabbi; and their synagogues were not prohibited.[8]

[1] Dialogus I. v (Sel. Ch. 185). [2] Madox ii 26.

[3] Bigelow 235; Madox i 155, 209, 214.

[4] Madox, i 219.

[5] Dialogus I. vii (Sel. Ch. 195, 196), "Ad hunc (the upper Exchequer) accedunt barones, cum proponitur eis verbum ambiguum ad scaccarium, de quo malunt seorsum tractare quam in auribus omnium; maxime autem propter hoc in partem secedunt, ne compoti, qui ad scaccarium fiunt, impediantur; quibus moram facientibus in consiliis consuetus cursus compotorum agitur. Si quid vero natum fuerit quæstionis, referetur ad eos." See Foss, Judges i 180; Y.B. 16 Ed. III. ii (R.S.) xxxi-xxxviii.

[6] Madox, chap. vii; Select Pleas, etc., of the Jewish Exchequer (S.S.).

[7] Madox i 221; Laws of Edward the Confessor c. xxv.

[8] Select Pleas, etc., xi, xii, xiii, 1-3; Madox 244-249, 260, 261. Some towns as Newcastle and Derby paid a fine to the crown in order that no Jews might be allowed to come there.

Though they were thus protected by the crown they were hated by all classes of the community. The superstition of the populace combined with the indebtedness of the higher classes to produce this result. In 1189 attacks were made on most of the Jewries in England. Their bonds were destroyed. But the crown suffered much from this diminution in the wealth of its chattels.[1] It was for this reason that measures were taken which resulted in the establishment of the Exchequer of the Jews. The Jews were better protected against violence. But they, and to some extent, therefore, their debtors,[2] were left more completely at the mercy of the crown.

In London, Lincoln, Oxford and other towns in which there were important settlements of Jews, Archæ, or registries for the Jewish bonds or chirographs were established. They were put under the charge of four Chirographers (two Christians, and two Jews) assisted by clerks. It was provided that all contracts of loan should be in a certain form, and that a copy should be deposited in the Archa. All acquittances or assignments (Starra) must be also enrolled there. The Archa could only be opened in the presence of a majority of the Chirographers at stated times or by order of the Exchequer.[3] It was this system of registration which seems to have given rise to the Exchequer of the Jews. In 1198 "Custodes Judæorum" are mentioned. They were usually appointed by the king, but sometimes by the Treasurer and Barons.[4] They "exercised jurisdiction in the affairs of the Judaism; namely in the accounts of that revenue, in pleas upon contracts made with the Jews, in causes or questions touching their lands or chattels, their tallages, fines, forfeitures or the like."[5] They were under the control of the Barons of the Exchequer who could annul their judgments or punish their misdemeanours.[6] Their jurisdiction was not, however, exclusive. Cases in which Jews are accused of crimes are found among the Crown Pleas. Various regulations as to different branches of the jurisdiction exercised by the Jewish Exchequer were in fact made at different times.[7]

[1] Select Pleas, etc., xvii, xviii.

[2] This is illustrated by § 10 of Magna Carta, "Si quis mutuo ceperit aliquid a Judaeis, plus vel minus, et moriatur antequam debitum illum solvatur, debitum non usuret quamdiu hæres fuerit infra aetatem, de quocumque teneat; et si debitum illud inciderit in manus nostras, nos non capiemus nisi catallum contentum in carta."

[3] Select Pleas, etc., xviii-xx; Madox i 238-240, 246. [4] Madox i 233, 234.

[5] Ibid 234, 235. [6] Ibid 252-255. [7] Select Pleas, etc., xxi-xxiii.

The position of the Jews placed between the crown and the nobles became almost impossible in the latter part of John's reign. They were required in Henry III.'s reign to wear a badge. Though they enjoyed comparative peace during the Protectorate of De Burgh, their freedom was still further restricted and their privileges curtailed after his fall. Edward I.'s reign produced no alteration. In 1290 Edward gained popularity, supplies, and many escheats of lands and chattels by banishing the Jews. Until the Protectorate of Oliver Cromwell they were seen no more in England.

iii. The Itinerant Justices.

The practice of sending royal commissioners through the country on royal business begins soon after the Norman Conquest. In earlier times the king himself journeyed over the country administering justice. He did not cease to do so after the Conquest. But it is after the Conquest that we first meet with these delegates of the Curia Regis. William I. sent them round the country to collect the evidence from which Domesday Book was compiled. Henry I. we know from the Pipe roll of the Exchequer sent them round the country on fiscal business.[1] Even in Stephen's reign justices travelled over the country to hear the civil and criminal pleas of the crown.[2] It is probable that before Henry II.'s reign these commissions were not issued either frequently or regularly. Other expedients were adopted for bringing the local into touch with the central government. The king might direct a noble or the sheriff to try a case in the county court, or before the courts of several counties.[3] Sometimes the sheriffs themselves were royal justices in several counties.[4] But the former expedient became insufficient to deal with the large mass of cases regularly heard in the Curia Regis. The latter is clearly liable to abuse. It will lead to usurpation and is in terms forbidden by Richard I.[5] What is required is the superintendence of professional justices free from local bias acting as members of the Curia Regis. This feeling was expressed in the clause of Magna Carta which forbade sheriffs to hear pleas of the crown.[6]

It is from the reign of Henry II. that these justices regularly

[1] Stubbs, C.H. i 443. In 1096, William II. sent Wakelin, bishop of Winchester, Randulph the royal chaplain and two others to Devonshire, Cornwall and Exeter, "ad investiganda regalia placita," Bigelow 69.

[2] Madox i 146.

[3] Bigelow 4, 17, 33, 71, 200.

[4] Stubbs, C.H. i 444.

[5] 1194, Sel. Ch. 260.

[6] Cap. 24, "Nullus vicecomes, constabularius, coronatores, vel alii ballivi nostri, teneant placita coronæ nostræ."

travel round the country. The assizes of Clarendon (1166) and Northampton (1176) were enforced by them. They were in fact instructions to the itinerant justices. In 1176, 18 justices were assigned to 6 circuits. In 1179, 21 justices were assigned to 4 circuits. From 1176 onwards some part of the country was regularly visited by the itinerant justices.[1] We can see that in Glanvil's day the distinction between the Curia Regis and the itinerant justices is already well marked.[2]

The commissions under which the itinerant justices acted were very various. They were not as yet enrolled as they were in later days. But we can make some conjectures from the records of fines and amercements which appear upon the Pipe roll of the Exchequer. Sometimes the justices were sent out to hear the possessory assizes. Under the assizes of Clarendon and Northampton they hear criminal and civil pleas of the crown, and have in addition other duties which are administrative in character.[3] They sometimes assist in the fiscal business of the Exchequer by assessing the taxpayer.[4] In 1194 we have a set of "capitula placitorum Coronæ Regis." The justices are to hear all pleas pending before the Curia Regis. They are to enquire into escheats, and churches in the gift of the king; wardships, marriages, criminals, aids, usurers, wine sold contrary to the assize, the property of deceased crusaders. They are to hold the great assize whatever the value of the property. They are to tallage the towns and the demesnes of the king. They are to enquire into the value of lands belonging to the king as wardships or escheats.[5] In the justices who acted under these extensive commissions we can see the justices in eyre of later times.

In Magna Carta we can see the beginnings of a classification between the different sets of itinerant justices. The justices of assize, who are ordered to go into each county four times a year to hold the possessory assizes,[6] are clearly distinct from the justices who enquire into the general administration of the county. Here, as in other departments

[1] Madox chap. iii § 10; Gesta Henrici (R.S.) ii, lxiii-lxxiii.

[2] Glanvil viii 5, "distinguendum est utrum concordia illa facta fuerit in capitali curia domini regis, an coram justitiis itinerantibus"; Select Pleas of the Crown (S.S.) xix-xxi.

[3] Sel. Ch. 143, 150.

[4] Stubbs, C.H. i 656.

[5] Sel. Ch. 258-263.

[6] Cap. 18, "Recognitiones de nova dissaisina, de morte antecessoris et de ultima præsentatione non capiantur nisi in suis comitatibus et hoc modo; nos, vel si extra regnum fuerimus, capitalis justiciarius noster, mittemus duos justiciarios per unumquemque comitatum per quatuor vices in anno." This was reduced to one visitation by the charter of 1217.

of the Curia Regis, we see a split between judicial and administrative work.

iv. The Court of Common Pleas.

We are told by Benedictus Abbas that in 1178 Henry "per consilium sapientium regni sui quinque tantum elegit, duos scilicet clericos et tres laicos, et erant omnes de privata familia sua. Et statuit quod illi quinque audirent omnes clamores regni, et rectum facerent, et quod a curia regis non recederent, sed ibi ad audiendum clamores hominum remanerent; ita ut si aliqua quæstio inter eos veniret, quæ per eos ad finem duci non posset, auditui regio præsentaretur, et sicut ei et sapientoribus regni placeret terminaretur."[1]

We have here indications of a tendency to a division in the Curia Regis to which we can probably trace the Court of Common Bench or Common Pleas. Shortly after 1178, we have mention in Glanvil's book of justices "in banco residentes."[2] Cases are removed from the court coram rege to the justices of the Bench.[3] We get fines levied sometimes coram rege, sometimes before the justices of the Bench. We have writs of summons issued by the Bench and amerciaments inflicted by it. But as yet there is no clear division. In the reigns of Richard and John, when the king is absent most of the judicial business seems to be done by the Bench. But when the king is present it is difficult to distinguish the Bench from the court held coram rege. Both were in fact Curia Regis—divisions of the king's court. They are not yet separate courts. Whether the court will be the Bench or the court held coram rege would almost seem to depend on the accident of the king's presence.[4]

The rolls of the Curia Regis tell us the same thing. There are not yet two sets of rolls—"coram rege" and "de banco" rolls. But it is possible to classify the cases on the rolls according as they were heard before the Bench or the king

[1] Sel. Ch. 131; Gesta Henrici (R.S.) ii, lxxiv-lxxvii.

[2] Glanvil ii 6; viii 1; xi 1. The official title of the judges of the Court of Common Pleas was "the justices of our Lord the King of the Bench." The official title of the judges of the Court of King's Bench was "the justices of our Lord the King assigned to hold pleas before the king himself."

[3] Madox i 790, 791, 7 John, a fine for removing an assize which is coram justitiariis in banco, coram rege. But (2 John) a plea to the jurisdiction of the Bench of a person privileged to be sued only before the king was overruled on the ground that the Bench was the king's court, Abbrev. Placit. 32.

[4] Possibly the case of Gilbert de Plumpton (1184) shows that the king was not always present in the court held coram rege, Bigelow 233, 234; Pike, H. of L. 35. Perhaps the capacity of the king to be present, owing to his being in the vicinity, is coming to be the test, rather than his actual presence, Select Pleas of the Crown (S.S.) xii-xvi; Madox i 788-795.

himself. The expression coram rege is used in the latter case; the expressions coram justiciariis de banco or apud Westmonasterium in the former.[1] But the rolls show us that the Bench entertained all classes of pleas—pleas of the crown as well as common pleas.[2] The judges sit now in one division of the Curia Regis now in another.[3] Cases can be moved to one division from another at the pleasure of the king.

We can see from the rolls that the Bench in John's reign often sat at Westminster. The justices of the Bench are sometimes called the justices at Westminster. Magna Carta provided that the common pleas should cease to follow the king and should remain in some fixed place.[4] This clause shows us that before Magna Carta common pleas did follow the king; but that there was a separate class of cases and a separate division of the Curia Regis which were sufficiently distinct to be the subject of express legislation.[5] This clause of Magna Carta made the court comparatively stationary; and we shall see that during Henry III.'s minority no court was for some years held coram rege. These seem to have been the causes which made the Bench a really distinct court inferior to the court held coram rege.[6]

We can thus see at the end of this period the beginnings of those central institutions from which spring the courts which administer English law. We can see a strong central court which acts as a law court, as an executive, and as a legislative body. But we can see that this court sometimes assumes the shape of a larger deliberative council which tends to separate from a smaller executive and judicial body. We can see in the Exchequer a department of this central court which controls and organizes the finance of the kingdom; and in pursuance of this duty it necessarily passes in review the local government of the country. We can see in the itinerant justices committees of the central court who control the working of the local government; we can see also that they are judges who carry the law and the procedure of the central court into all parts of the country. So large a jurisdiction has this central court

[1] Madox i 788, 789; Select Pleas of the Crown (S.S.) xvi, xvii.

[2] Madox i 793.

[3] In a case against the Prior of Christchurch (9 Rich. I.) there were present not only the justices but the justiciar, an earl and various barons, Pike, H. of L. 39.

[4] Cap. 17, "Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo."

[5] Madox i 792.

[6] Select Pleas of the Crown (S.S.) xviii, xix.

assumed, that at the end of the period the division of it which takes cognisance of common pleas has become almost a distinct tribunal. On the whole this new system works well. The feudal lord may object to the claims of a court which withdraws from him jurisdiction and its profits.[1] He may ask to be tried by the old judicium parium and the ordeal or battle instead of by a royal judge and a royal jury. But at the end of this period it is clear that the future of English law is with royal justice, and therefore that there will be a law common to the whole of England.

But before we describe the development and organization of the courts which administer royal justice, we must first trace the history of the decay of the local courts which this royal justice superseded.

[1] Magna Carta, cap. 34, "Breve quod vocatur *præcipe* de cetero non fiat alicui de aliquo tenemento under liber homo amittere possit curiam suam." But he was glad enough to get royal writs to coerce his tenants, Glanvil ix 9 and 12. In the end this clause of the charter is evaded. Below 65, 66.

## CHAPTER II

# THE DECLINE OF THE LOCAL COURTS AND OF PRIVATE JURISDICTION

AFTER the reign of John the local courts can more clearly be divided into groups according to the various principles upon which their jurisdiction is based.[1] (1) The communal courts. These are the courts of the Anglo-Saxon communities—the courts of the shire and hundred. Their officials, since the Conquest, are clearly royal officials. The power of these officials and the jurisdiction of the courts have been defined and strengthened by the new methods, and by the constant supervision of the Curia Regis. (2) The courts of the franchises. The Quo Warranto enquiries of Edward I.'s reign resulted, as we shall see, in laying down the principle that certain forms of private jurisdiction can exist only by royal grant or by prescription. (3) The feudal courts. These are the courts which depend upon the principle that the lord of tenants can hold a court for his tenants merely because they are his tenants. (4) The manorial courts. We shall see that the vague term manor acquires yet another meaning. A manor involves not only certain real rights of a specified kind over certain lands, but also certain jurisdictional rights.

About the actual working of the communal courts our information cannot be very complete. They did not keep general records of their proceedings. Glanvil explains that such records are kept only by the Curia Regis.[2] As a general rule their proceedings were only recorded when it was necessary to bring the proceedings of such courts before the Curia Regis by writ of recordari facias.[3] Hence the

[1] Select Pleas in Manorial Courts (S. S.) xv, xvi; P. and M. i 512-517.

[2] Leg. Henr. xlix 4 refer to the records of the Curia Regis. Glanvil viii 8, "Sciendum tamen quod nulla curia recordum habet generaliter praeter curiam Domini Regis."

[3] Glanvil viii 8. Hence a man can deny that he has made certain statements in other courts "contra totam curiam tertia manu cum sacramento . . . vel cum pluribus vel cum paucioribus secundum consuetudinem diversarum curiarum." For the writ see ibid 9 and App. IX, A. But (ibid 10) the county did keep records "de plegiis vel plagis datis et receptis in ipso comitatu et in similibus."

court of the shire and the hundred are not courts of record.[1] Of the proceedings of the other three groups of courts we do get some records.[2] The oldest court roll we possess dates from 1246; but there is indirect evidence that the abbot of Ramsey kept rolls in 1239. The practice of keeping records of the proceedings of such courts became general about the middle of the 13th century. The manorial extents show us that just about this time landowners were beginning to catalogue their possessions. The extent describes the various manors which make up the estate of a large landowner. Inquiry is made into the state of the buildings, the state of cultivation, the acreage, the common rights, the jurisdictional rights, the terms upon which the tenants hold—into all facts, in short, which bear upon the value of the property.[3] The rolls of the court give the landowner similar information as to the working and the profits of his jurisdictional rights. In the first instance they may have been regarded as a check merely on the lord's officials. The earlier rolls are occupied mainly with fines and amercements. They become a complete record of the court's proceedings. "The extent displays the manor at rest, the court roll the manor in motion."[4]

We must now shortly describe the history of these various groups of courts.

(1) The communal courts.

These we shall describe under the following heads. (i) The sheriff and the county court. (ii) The hundred court and the sheriff's tourn. (iii) The Coroner.

(i) The sheriff and the county court.

The immediate result of the large jurisdiction assumed by the Curia Regis is an increase in the power of the sheriff. As the royal delegate, in close touch with the Exchequer and the Curia Regis, he grows in importance with the growth of the royal power, until he becomes the ruler of the county. He is responsible for the revenue of the county, for its military force, for its police, for its gaols, for its courts, for the due execution of the writs or other orders addressed to him by the Curia Regis. But these great powers have gradually been taken from him. "The whole history of English Justice and Police might be brought under this rubric, The Decline and Fall of the Sheriff."[5]

[1] Jacob's Law Dictionary Tit. Record; P. and M. ii 666, 667.
[2] As to these see Select Pleas in Manorial Courts xii-xv.
[3] See Domesday of St Paul (C. S.); Digby, R.P. (4th Ed.) 211-215.
[4] Select Pleas in Manorial Courts xiv.
[5] Maitland, Justice and Police 69.

By the 13th century it is clear that the sheriff is not an hereditary official. By Edward III.'s reign it is settled that he is appointed by the crown and is not an elective official.[1] The Sheriffs Act of 1887 restates the manner in which he has been appointed since Edward III.'s reign.[2] In Edward III.'s reign, too, it is settled that he must be appointed annually, and that he must have land in his county.[3] In Richard II.'s reign it is settled that he cannot be reappointed till three years have elapsed from the expiration of his year of office.[4] He is responsible for the appointment of an under sheriff and for the appointment of the bailiffs of hundreds and other officials necessary for the government of the county. He can be held personally liable for their misdeeds. He was in Henry II.'s reign one of the chief accountants of the crown. At Easter and Michaelmas he appeared at the Exchequer to answer for the revenue of the shire.[5] Various statutes restrained him from letting his hundreds and bailiwicks to farm at excessive rates.[6] But the revenue for which he is answerable gradually becomes inconsiderable.[7] New taxes and rates are imposed with which he has nothing to do. His attendance at the Exchequer is no longer required.

His control over the military force of the shire ceased with the appointment of lord lieutenants in Mary's reign. He can still call out the posse comitatus; and "every person in a county shall be ready and apparelled at the command of the sheriff and at the cry of the country to arrest a felon, whether within a franchise or without, and in default shall on conviction be liable to a fine."[8] But the rise of a new system of county police has deprived him of the control of the effective police force of the county.[9]

Abuse of the sheriff's control over prisoners in his custody was the subject of much legislation in the 14th and 15th centuries.[10] He has now nothing to do with prisoners. The only prisoners for whom he is responsible are prisoners condemned to death.[11] Most of these duties were, as we shall see, turned over to the justices of the peace. He was deprived

[1] 9 Ed. II. St. 2; 14 Ed. III. St. 1 c. 7; 23 Hy. VI. c. 7; 3, 4 Will. IV. c. 99 § 3.
[2] 44, 45 Vict. c. 68 § 16; 50, 51 Vict. c. 55 § 6.
[3] 5 Ed. III. c. 4; 28 Ed. III. c. 7; 50, 51 Vict. c. 55 §§ 3 and 4.
[4] 1 Rich. II. c. 11; 50, 51 Vict. c. 55 § 5.
[5] In the Dialogus de Scaccario the sheriff is throughout spoken of as the chief accountant to the crown.
[6] Below 43 n. 1.
[7] Cf. 3, 4 Will. IV. c. 99 §§ 12, 14, 15; 22, 23 Vict. c. 21.
[8] 50, 51 Vict. c. 55 § 8.
[9] 10 Geo. IV. c. 44; 2, 3 Vict. c. 95; 22, 23 Vict. c. 32 § 18.
[10] 3 Ed. I. c. 15; 14 Ed. III. St. 1 c. 10; 19 Hy. VII. c. 10.
[11] 28, 29 Vict. c. 126; 40, 41 Vict. c. 21 § 32; 50, 51 Vict. c. 55 § 13.

of all share in the new government of the county by an act of Mary which prevented him from acting as justice of the peace.[1]

In fact, the sheriff has sunk from the position of ruler of the county to the position of an attendant or servant to the central courts of law, to the itinerant justices and to the justices of the peace in quarter sessions. He must summon juries, give the requisite notices to prosecutors or others, prepare the calendar of prisoners, prepare the judge's lodgings and attend upon him during the assizes.[2] These duties spring directly from his relation to the Curia Regis in Henry II.'s reign. From the time of Glanvil to the present day the sheriff is the official to whom royal writs are addressed. It is the execution of writs that forms the chief part of his duties at the present day. It is this part of his duty which gives him control over Parliamentary elections. Numerous statutes control the sheriff in the execution of these duties. They assign penalties for non-returns or for false returns, or they fix the fees which the sheriff is entitled to exact.[3] For the better execution of this part of his duties he must keep a deputy to receive writs within one mile of the Inner Temple Hall.[4]

The county court declined with the decline of the sheriff. But as with the sheriff, so with the county court, the first effects of the reforms of Henry II. were to increase its importance.[5] In the county court the itinerant justices conducted their business; and an especially full assembly of the county was summoned to meet them.[6] But they gradually drew from the county court the greater part of its business. They apply the newer methods of procedure. Cases are tried by judge and jury; while in the county court all the suitors continue to be the judges. Thus the courts held by the itinerant justices became quite distinct from the county court.

The criminal jurisdiction of the county court was diminished by the assizes of Clarendon and Northampton. By the assize of Clarendon[7] jurisdiction over the "robator vel

[1] 1 Mary St. 2 c. 8; 50, 51 Vict. c. 55 § 17.

[2] This was beginning to be the case in the 15th century, Fortescue, De Laudibus c. 24; Impey, The office of sheriff (Ed. 1786) 364-378; 50, 51 Vict. c. 55 § 9. He has nothing to do with the new county courts. The County Court Acts create a High Bailiff whose relation to these courts answers to the relation of the sheriff to the High Court, L.Q.R. iii 9.

[3] 13 Ed. I. St. 1 c. 39; 2 Ed. III. c. 5; 29 Eliza. c. 4; 3 Geo. I. c. 15; 50, 51 Vict. c. 55 §§ 10, 11, 14, 15, 16, 20.

[4] 3, 4 Will. IV. c. 42 § 20; 50, 51 Vict. c. 55 § 24.

[5] Above 21-23. [6] Below 113. [7] Sel. Ch. 143.

murdrator vel latro" was reserved to the royal justices; forgery, treason and arson were added by the assize of Northampton.[1] The sheriff could only try less serious thefts and robberies; and in later times no case which involved a breach of the king's peace. Magna Carta prevented him from holding pleas of the crown.[2] The rise of the justices of the peace took away from him jurisdiction over minor criminal cases.

The civil jurisdiction of the county court may be classified under the following heads:—(1) Actions of debt, detinue and covenant; actions of trespass, unless the trespass were committed vi et armis, or unless brought for taking away title deeds to freehold property.[3] The interpretation put upon the statute of Gloucester deprived the county court of this jurisdiction if the amount at stake exceeded 40s. in value.[4] This was a large sum when the statute was passed; but it was a fixed sum; and the decrease in the value of money inevitably decreased the importance of the jurisdiction of the county court. Moreover by writ of Pone[5] any of these cases could be removed into the king's court. (2) The court held jurisdiction to any amount, and even in cases of trespass vi et armis, by virtue of a writ of Justicies[6] directed to the sheriff. By other writs which Coke says "are in the nature of a commission" the court had jurisdiction in cases of admeasurement of pasture or dower and many others.[7] This jurisdiction depended simply on the issue of the necessary writ. Such writs gradually ceased to be issued. (3) From Henry II.'s time cases concerning the possession of freehold land belonged to the jurisdiction of the king's court: cases concerning the ownership of freehold land were practically divided between the king's court and the court of the lord of whom the land was held.[8] The sheriff could remove cases from the lord's court by virtue of his precept called Tolt.[9] But such cases came, as we shall see, to be always begun in the court of Common Pleas.[10] (4) In Henry III.'s reign the county court was prevented from ever becoming a court of

[1] Sel. Ch. 150; Bracton 154 b.
[2] § 24; 50, 51 Vict. c. 55 § 18. 3.
[3] Coke, 2nd Instit. 311, 312; 4th Instit. 266; Bl. Comm. iii 35-37.
[4] 6 Ed. I. c. 8; Britton i 155; P. and M. i 540, 541.
[5] App. VII. [6] App. VI.
[7] 2nd Instit. 311, 312, e.g. cases of replevin (52 Hy. III. c. 21), and redisseisin (20 Hy. III. c. 3); P. and M. ii 44, 575. In such cases the sheriff was a royal judge. [8] Below 65, 66.
[9] Called tolt "quia tollit atque eximit causam"; App. VIII. By this precept cases could also be removed from the hundred court, Bracton ff. 105, 105 b.
[10] Below 66.

appeal from the other courts of the county. By a statute of Henry III.'s reign (1268) pleas of false judgment were reserved for the king's court.[1]

The decay of the county court was not wholly undeserved. "Of his own free will the small freeholder passed by his lord's court and the county court on his way to the great hall."[2] The older methods of procedure prevailed in the county court. The suitors were the judges. Compurgation might still be employed. Sheriffs were sometimes partial or worse. A statute of Henry VII.'s reign would seem to show that they were in the habit of entering fictitious plaints in the county courts merely for purposes of extortion.[3] All attempts to revive the county court failed. A statute of Elizabeth's[4] reign was passed to "avoid trifling or frivolous suits in Her Majesty's courts at Westminster." Judges were given power to deprive a plaintiff of full costs if less than 40s. were recovered in the action. If the action were originally brought for less than 40s., those who had issued the process were liable in addition to a fine of £10. This act does not seem to have had much effect. The space which Coke gives to the county court in his Fourth Institute is but small. Blackstone laments its disuse.[5] Not even statutory recommendation could revive it.[6] In 1887 it was enacted that a sheriff need not hold a county court unless the court is required for an election, for the execution of some writ, or for any other specific purpose.[7]

The new county courts are the creatures of modern statute. They are given the style of county court, but the statute has merely affixed an old name to a new creation.[8]

(2) The hundred court and the sheriff's tourn.

The hundred court[9] had originally, as we have seen, a jurisdiction similar to that of the county court. Like the county court it is no court of record, and the suitors are the judges. Its decisions could, as we have seen, be reviewed by the county court until 1268. It was usually let to farm by the sheriff. Statutes were passed to prevent the sheriff

[1] 52 Henry III. c. 19; App. IX, A and B. This writ lies when the proceedings are begun in a court which is not a court of record. The writ of error when the proceedings are begun in a court which is a court of record.

[2] P. and M. i 181, 182.

[3] 11 Hy. VII. c. 15. The "trading justices" of the 18th century made money in much the same way, below 130.

[4] 43 Eliza. c. 6. [5] Comm. iii 82.

[6] 3, 4 Will. IV. c. 42, §§ 17, 22. It was the same with other inferior courts, 21 Jac. I. c. 23; Bl. Comm. iii 82; 12 Geo. I. c. 29 § 3.

[7] 50, 51 Vict. c. 55 § 18. 1.

[8] Below chap. ix. [9] Coke, 4th Instit. 267.

letting it at an excessive farm,[1] and, finally, the practice was altogether prohibited.[2] The same causes which produced the decay of the county court produced the decay of the hundred court. It is provided by the County Courts Amendment Act that no action which can be brought in one of the new county courts shall be brought in a hundred court.[3]

The sheriff's tourn,[4] or view of frankpledge, is a court of record. The sheriff holds the court as a royal deputy, and is himself the judge. It is a specially full meeting of the hundred court held twice a year, one month after Easter and one month after St Michael's day. The word "tourn" means the perambulation of the sheriff. What the eyre of the royal justices was for the kingdom, the sheriff's tourn was for the county.

The assize of Clarendon[5] combined the machinery of the frankpledge with the jury of presentment. The procedure of the tourn as described by Britton[6] and Fleta[7] is substantially similar to that prescribed by the assize of Clarendon. The tithings appear by their chief pledges,[8] the townships by their reeve and four men. Certain enquiries known as the articles of the tourn are addressed to them. In the first place, they are required to state whether the system of frankpledge is in good working order. Then they are required to present persons suspected of certain offences. These presentments are either accepted or rejected by the twelve men of the hundred. If accepted the offenders are presented to the sheriff. The sheriff sends those accused of the more serious crimes to the itinerant justices, or, if they are not in custody, directs their arrest. The lesser offences he punishes by amercement. The amercements are assessed by two suitors of the court.[9] It is clear that this procedure can be made useful for many purposes. The articles of the tourn increase

[1] 4 Ed. III. c. 15; 14 Ed. III. c. 9.

[2] 4 Hy. IV. c. 5; 23 Hy. VI. c. 9; 3 Geo. I. c. 15 § 10; 50, 51 Vict. c. 55 § 27; above 7 n. 6.

[3] 30, 31 Vict. c. 142 § 28. Compensation is provided for those whose franchises are diminished in value by the operation of the act.

[4] The style of the court is "Curia Visus Franciplegii Domini Regis tenta apud B coram Vicecomite in Turno Suo," Coke, 2nd Instit. 71; 4th Instit. 259, 260; Bl. Comm. iv 270, 271; Select Pleas in Manorial Courts xxvii-xxxiv; above 8 and 9.

[5] Sel. Ch. 143 c. 1. "Inprimis statuit . . . quod per singulos comitatus inquiratur, et per singulos hundredos per xii. legaliores homines de hundredo et per iv. legaliores homines de qualibet villata."

[6] i 177-185. [7] II. 52.

[8] Money was paid by the frankpledge, "ne vocentur per capita." It was called chevajium, Select Pleas in Manorial Courts xxxi.

[9] P. and M. i 546, 547.

in number. The Statutum de Visu Franciplegii[1] gives us a very miscellaneous list of enquiries. The sheriff, among other things, wishes to be informed as to purprestures, stoppage of ways, housebreakers, thieves, affrays, escapes, forgers, treasure trove, breakers of the assize of bread and ale, false measures and weights, and of "such as sleep by day and watch by night, and eat and drink well and have nothing." All that goes on in the county is thus twice a year brought before the sheriff.

An act of Henry III.'s reign[2] defined the persons who were obliged to attend at the tourn. Archbishops, bishops, abbots, priors, and religious men and women need not appear unless their presence is specially required. Those who have lands in different hundreds are only required to attend the tourn of the hundred in which they reside. A statute of 13 Edward I. c. 13 enacts that inquests are to be taken by twelve lawful men who shall set their seals to the indictment.[3]

A statute of 1327[4] shows that the proceedings of the sheriffs in the tourns are already viewed with some suspicion. The indictments are to be taken on a roll indented: one part is to remain with the indictors, the other with the person who takes the inquest. One of the jury is to convey the roll to the justices in order that the indictments may not be embezzled. These securities were ineffectual. A statute of Edward IV.'s[5] reign forbids the sheriff to arrest persons, or to levy fines upon the indictments. The indictments must be delivered to the justices of the peace, who for the future will issue process upon them. In fact, cognisance of the smaller offences, which fell within the jurisdiction of the tourn, was in the Tudor period handed over to the justices of the peace.[6] The more serious crimes are enquired into by the same officials, and presented by the grand jury of the county.[7] In the time of Coke the tourn was obsolete. "Vera institutio, he says, istius curiæ evanuit, et velut umbra ejusdem adhuc remanet."[8] The ghost was not laid till 1887.[9]

(iii) The Coroner.

We can see from the inquest of sheriffs (1170) that the crown in Henry II.'s reign viewed the power of the sheriff with some suspicion.[10] The coroner was an officer placed by

[1] 18 Ed. II. For other lists see Britton i 177, and Fleta II. 52.
[2] 52 Hy. III. c. 10 (Statute of Marlborough).
[3] 1 Rich. III. c. 4 fixes the qualification for the juries at 20s. freehold, 26s. 8d. copyhold. [4] 1 Ed. III. c. 17. [5] 1 Ed. IV. c. 2. [6] Below 123-127.
[7] Below 147, 148. Hale, 2 P.C. 69-71.
[8] 2nd Instit. 72. [9] 50, 51 Vict. c. 55 § 18. 4.
[10] Stubbs, Sel. Ch. 148.

the side of the sheriff to safeguard the interests of the crown. It has always been supposed that the first institution of coroners dates from 1194. One of the articles of the eyre in that year provides that there be chosen in each county "tres milites et unus clericus custodes placitorum coronæ."[1] But it is a question whether this is the creation of a new office, or whether it is merely the recognition of an existing institution.[2] Certain borough charters of an earlier date seem to recognise such an officer. In Henry I.'s charter to London there is mention of a "justitiarium . . . ad custodiendum placita coronæ meæ et eadem placitandum." In Richard I.'s charter to Colchester, 1189, a similar officer is mentioned.[3] In the rolls of the Curia Regis for 1194 there is mention of "milites custodientes placita coronæ," who give evidence as to proceedings in the county court.[4] Professor Maitland does not, however, consider that these facts sufficiently prove that before 1194 officers existed whose sole duty was "servare" or "custodire" as distinguished from "placitare" or "tenere."[5] At the same time we must remember that the distinction was evidently not very clearly observed, seeing that Magna Charta found it necessary to forbid, not only sheriffs but also coroners from holding the pleas of the crown;[6] and there is evidence that after Magna Charta the coroner, either alone or in conjunction with the sheriff, held certain kinds of pleas.[7] The crown may have appointed certain officials to safeguard its interests before 1194. At any rate the office and its duties do not become distinct till after that date.

Throughout the 13th and 14th centuries there were usually four coroners for each county.[8] In 1844 an act was passed dividing the counties into coroners' districts.[9] They continued to be elective till the Local Government Act of 1888 transferred their appointment to the county councils.[10] In addition to the county coroners there were special coroners for the king's court, for the admiralty, for London and certain other towns, and in cases where some individual had the special franchise of appointing a coroner.[11]

In the 13th and 14th centuries the duties of the coroner

[1] Stubbs, Sel. Ch. 260. [2] Select Coroners' Rolls (S.S.) xiv-xix.
[3] Coroners' Rolls xv. [4] Ibid xvii.
[5] Engl. Hist. Rev. viii 758. [6] § 24.
[7] Coroners' Rolls xxv, xxvi.
[8] Ibid xx; Bl. Comm. i 335, 336. In different counties the numbers varied, Hale, 2 P.C. 56. [9] 7, 8 Vict. c. 92. [10] 51, 52 Vict. c. 41 § 5.
[11] Britton i 4; Coroners' Rolls xxii, xxiii, xxix; 50, 51 Vict. c. 71 §§ 7, 29, 30 (the Coroners Act); Hale, 2 P.C. 54.

were wide. The office was, as we have seen, established to look after the interests of the Crown, especially its interests arising from the due administration of criminal justice.[1] He held a court which was a court of record. He might be required to execute the king's writs "when there is just exception taken to the sheriff."[2] He kept rolls which were of great value to the itinerant justices in checking the verdicts of the juries of the hundreds.[3]

His court declined in importance with the decline of the hundred and county courts; and his relation to the itinerant justices altered when the justices in eyre gave place to the justices of assize.[4]

In former times he received and entered the appeals or criminal accusations of those who wished to accuse any of felony. He received the declarations of approvers.[5] He kept a record of outlawries, and received the confession and abjuration of criminals who had taken sanctuary.[6] The procedure by way of appeal in criminal cases is now abolished; and the Coroners Act of 1887 now provides[7] that, "a coroner shall not take pleas of the Crown nor hold inquests of royal fish or of wreck, nor of felonies, except felonies on inquisitions of death; and he shall not enquire of the goods of such as by the inquest are found guilty of murder or manslaughter, nor cause them to be valued and delivered to the township."

His chief and most permanent duty is to hold inquests in all cases of unexplained death. At the inquest Englishry might be presented; the thing which had caused the death was seized for the Crown as a "deodand";[8] the person suspected of having caused the death might be indicted, his goods appraised, and he himself attached to appear before the itinerant justices.[9] In 1554[10] the coroner was required to put into writing the effect of any material evidence given at the inquest; and he was empowered to bind over the witnesses to appear at the trial.

The coroner is bound also to enquire as to the concealment of treasure trove, and to attach those who have made

[1] Bracton f. 121 b; Britton i 8 sqq; Fleta I. caps. 18, 20 and 25; 4 Ed. I. St. 2. As to this statute see P. and M. ii 641 n. 2. It is probably an extract from Bracton. [2] Coke, 4th Instit. 271. [3] Coroners' Rolls xxviii, xxix.

[4] Below 115, 116.

[5] I.e. a person who, being accused, offers to give up his accomplices, Stephen, H.C.L. i 250.

[6] Britton i 12, 13, 17; Hale 2, P.C. 67, 68. [7] 50, 51 Vict. c. 71 § 44.

[8] Holmes, Common Law 24-26; they were abolished 9, 10 Vict. c. 62

[9] Britton i 8-11.

[10] 1, 2 Phil. and Mary c. 13 § 5, superseded by 7 Geo. IV. c. 64 § 4 containing similar provisions.

away with it.[1] This merely gives him jurisdiction, "to enquire of treasure that is found, who were the finders, and who is suspected thereof." He has no jurisdiction to enquire into the title to treasure so found. The title of the crown does not depend upon the finding of the jury.[2]

Under the old law the coroners were obliged to act without remuneration.[3] Persons got royal grants of exemption from liability to undertake the office. In Henry VII.'s reign a fee of 13s. 4d. for every inquest of death was established.[4] In 1860 the fees were in most cases replaced by a fixed salary.[5] This salary is now regulated by the county council.[6]

(2) The courts of the franchises.

We have seen that in the Norman and Angevin period there is already a tendency to distinguish the franchise jurisdiction which rests upon royal grant from the purely feudal jurisdiction which rests upon tenure. The growth of the jurisdiction of the Curia Regis intensified this tendency. Bracton, as we might expect, states in a form which was exaggerated for his time the theory that all jurisdiction flows from the crown. "Pax et justitia" belong to the crown. Like a res sacra or a free man they cannot be bought or given. It is true that we see sac et soc, visus francipledgii, judicium latronum in the hands of private persons. But these persons hold them as royal justices. These things are, we may say, res quasi sacræ, which can be alienated only to royal justices.[7] In all cases those who claim to exercise these rights must show an express grant. Length of user, without such grant, so far from giving a title aggravates the offence.[8] "Nullum tempus occurrit regi." Bracton's theory was in Bracton's day prophetic rather than true.[9] The reign of Henry III. was a troublous time. The older franchises were exploited to the uttermost. It is true that their meaning was becoming obscure owing to the growth of the newer legal terms and ideas which the lawyers of the Curia Regis were spreading over the country.[10] But we get the rise of newer franchises in the newer legal phraseology. Amerciamenta hominum, catalla felonum, returnus brevium are granted or

[1] Britton i 18; 50, 51 Vict. c. 71 § 36.
[2] Atty.-General v Moore, L.R. 1893 1 Ch. 676.
[3] They sometiues extorted fees, Coroners' Rolls xxi.
[4] 3 Henry VII. c. 1 § 24; 1 Henry VIII. c. 7.
[5] 23, 24 Vict. c. 116.
[6] 51, 52 Vict. c. 41 § 5. 4.
[7] ff. 14 a; 55 b.
[8] ff. 55 b; 14 a "diuturnitas enim temporis in hoc casu injuriam non minvit sed auget."
[9] P. and M. i 559.
[10] P. and M. i 560, 561, 574; Select Pleas in Manorial Courts xxii, xxiii.

assumed.[1] Feudal ideas formed the political atmosphere of the Middle Ages. Feudal ideas meant, as we have seen, the distribution of political power among the larger landowners. The larger landowners procured the grant to themselves of the new processes and powers of the Curia Regis. Under weak kings like Henry III. or Henry VI. even the antifeudal organization of the central government was turned to feudal uses.

Thus when Edward I. came to the throne he found that this assumption of private jurisdiction had gone to considerable lengths. He sent out (1274) commissioners to enquire into the varied usurpations of the royal rights.[2] The results of these enquiries are embodied in the Hundred Rolls. They give us information respecting the jurisdiction of the 13th century similar to the information given to us by Domesday respecting the fiscal system of the 11th century. Upon the information so obtained Edward I. founded his Quo Warranto enquiries.[3] He sent out commissioners, furnished with copies of the Hundred Rolls, to enquire by what warrant different landowners were exercising their jura regalia.[4] The king's pleaders adopt Bracton's theory to its fullest extent. If no charter can be produced they at once claim judgment for the crown. If charters were produced they minimise the effects of all those which are not expressed in the proper technical terms.[5]

For many of the older franchises no charters could be shown. Charters were not common in Anglo-Saxon times; and, as we have seen, the Norman lords had been tacitly allowed to assume the private jurisdiction of their predecessors.[6] In the end the king was obliged to compromise his

[1] P. and M. i 570, 571. Their hindrance to the administration of the criminal law is well illustrated by the state of things in Northumberland, which bordered on the Palatinate of Durham, Northumberland Assize Rolls (Surtees Society) xix.

[2] Rotuli Hundredorum (Rec. Com.) Introd.; Stephen, H.C.L. i 126-133 App. XIX, A and B.

[3] Stat. of Gloucester (6 Ed. I.) Writs issued against the persons where the juries had found them in possession of franchises, etc., and "nesciunt quo warranto"; or they came in under the general proclamation directed by the Statute. In Gloucester and Lincoln the results of the Quo Warranto proceedings are entered in another hand on the hundred rolls. See App. XIX, C.

[4] Placita de Quo Warranto (Rec. Com.). The cases were sometimes adjourned "coram rege" or "coram rege in Parliamento."

[5] P. and M. i 559-561; Select Pleas in Manorial Courts xxii-xxiv.

[6] Select Pleas in Manorial Courts xxiii-xxvii; P. and M. i 567. The more serious franchises were usually prescribed for. "The Bishop of Durham spoke of Egfrith, the Archbishop of York received his gallows from Æthelstan, prescribed to coin money, and could not or would not show anything beyond long seisin in support of many of the famous privileges of Ripon and Beverley."

claims. The two Statutes of Gloucester[1] (1290) allowed that possession without interruption from the beginning of Richard I.'s reign conferred a good title; that old charters should be adjudged according to their form and tenor; and that those who had lost their franchises since the preceding Easter "according to the course of pleading in the same writ heretofore used" should have restitution.

Subsequent grants were made, it is true.[2] But the effect of these enquiries was to draw a clear line for the future. Silent usurpation was no longer possible.

For the most part the franchises allowed to stand are of the less important kind. We can see that large feudal principalities of the continental type are impossible in England. But there are certain striking exceptions to this rule. The Palatine jurisdiction in Durham, Lancaster, Chester, Wales, and the Stannaries, and in a lesser degree the liberties of Ely,[3] Pembroke,[4] and Hexham,[5] and the Universities of Oxford and Cambridge[6] are instances of such exceptions. In describing the franchises we shall therefore divide the subject into two parts. (1) The Palatinates. (2) The lesser franchises.

(1) The Palatinates.

England is governed by law common to the whole country. But there is no rule without an exception; and to this rule the palatinates are the exception. They are independent principalities of the continental type within which the king's writ does not run. Their environment, however, is not favourable to independent development. Their judicial system copies that of the common law. Acts of the English Parliament bind them. The rules of the common law are

Coke, 2nd Instit. 281, distinguishes franchises which can be claimed by usage and those which require a charter to warrant them. The second are the more modern class, e.g. felons' or outlaws' goods.

[1] 18 Ed. I. Stats. 2 and 3.

[2] Select Pleas in Manorial Courts lxxvii note C.

[3] Coke, 4th Instit. 220. It is sometimes called a county palatine e.g. 5 Eliza. c. 23 § 11; 7 Will. IV., 1 Vict. c. 53, assimilates its judicial organisation to that of the rest of the country. An act of 6, 7 Will. IV. c. 87 deals with some liberties of the Archbishop of York.

[4] Coke, 4th Instit. 221. It was an ancient county palatine within Wales. It was taken away by 27 Henry VIII. c. 26 § 17.

[5] Coke, 4th Instit. 222. Though called a county palatine in several statutes it was enacted, 14 Eliza. c. 13, that it should be parcel of the county of Northumberland and not a county palatine.

[6] Coke, 4th Instit. 227; Bl. Comm. iii 83-85; iv 274.276; Ginnett v. Whittingham (1886) L.R. 16 Q.B.D. 761; 17, 18 Vict. c. 81 § 45; Rashdall, Universities ii Pt. II App. XXXII.

applied in their courts. When they disappear their inhabitants are conscious of no revolution.

English law has no term to describe these great franchises. It adopts, therefore, a word of foreign origin.[1] When the word has been adopted it becomes possible to generalize concerning the entity so described. "The power and authority," says Coke,[2] "of those that had Counties Palatine was king-like, for they might pardon treasons, murders, felonies, and outlawries thereupon. They might also make justices of eyre, justices of assize, of gaol delivery, and of the peace. And all original and judicial writs, and all manner of indictment of treasons and felony, and the process thereupon was made in the name of the persons having such County Palatine. And in every writ and indictment within any County Palatine it was supposed to be contra pacem of him that had the County Palatine."

The history of the different counties palatine is a history in little of the common law. Their gradual subordination to, and merger in the judicial scheme of the rest of England is a long episode in the advance of royal justice—eloquent because it is silent.

*Durham.*

The Palatinate of Durham has a longer history than any of the other Palatinates; but all to some extent have a similar history. If we trace the history of this Palatinate at some length it will be possible to deal more shortly with the rest.

It will be found that the history of the Palatinate of Durham falls into two periods. (i) The period of growth up to 1536. (ii) The period of decline after 1536.

(i) The period of growth up to 1536.

We have seen that the grants of large territories and jurisdiction made to the see of Durham by the Anglo-Saxon kings were confirmed by grants of the Norman and Angevin kings.[3] We can see also from Henry II.'s charter that the jurisdiction of the bishop is wide and exclusive.[4] In Henry II.'s reign Bishop Pudsey held the see. He had been one of Henry's justices in eyre; and at the beginning of Richard I.'s

[1] "Since the distinguishing traits of these franchises lay in the exercise of local sovereignty, in a kind of limited royalty, scholars borrowed from the continent the convenient adjective palatinus, which was known in theory to imply something peculiarly royal, and in practice (on the Rhine and in Champagne) to denote very much the same sort of local independence that they were seeking to describe," Lapsley, The County Palatine of Durham 11; ibid 3-11. Bracton in one place, f. 122 b, mentions "Comites Paleys."

[2] 4th Instit. 205. [3] Above 12, 17. [4] Above 17 n. 3.

reign he was justiciar for the northern half of the kingdom. He began to organize his great franchise, and to introduce some of the improved legal ideas of the Curia Regis.[1] His successors continued his work. Over the rest of England the new legal ideas and procedure of the Curia Regis sapped the franchise jurisdiction. In Durham the Palatinate jurisdiction becomes more definite and exclusive by borrowing the new ideas and procedure. It comes to be a jurisdiction which differs not merely in degree but also in kind from the jurisdiction possessed by the ordinary holders of franchises.

The case of Geoffry FitzGeoffry which came before the king's justices in Northumberland (1205-1208) illustrates the beginning of the process.[2] He had been sued for his freehold in the bishop's court and had tried to put himself upon the Grand Assize. But he was told that the Grand Assize did not apply to Durham. He was forced to try his case by battle; and proceedings were taken before the king's justices on the question whether he ought to have been compelled to plead in the bishop's court. The result we do not know. But we can see that the men of Durham desire the procedural advantages of their neighbours. In 1208 and 1217 they pay the king money to get the assizes; and the grant is made "saving the liberties of the bishop." This as Mr Lapsley points out is the psychological moment.[3] Will the bishop leave the new process to the royal courts and continue to be the lord merely of a franchise, or will he reorganise his judicial system and become the lord of a Palatinate?

The latter alternative was chosen. We can see from a document of 1229 that there is a central court at Durham. The judges of this court hold eyres at the same times as the royal justices. They deal with pleas of the crown and cases concerning land begun by the bishop's writ. Below this court there are the old county courts. These extensive privileges were recognised when the Quo Warranto enquiries were held. "We have," as Mr Lapsley puts it, "left behind us the great franchise and are face to face with the county palatine."[4]

[1] Lapsley 163-165. He was bishop for forty-two years. For a list of the jura regalia see Registrum Dunelmense (R.S.) I. lv.

[2] Ibid 166, 313-316.

[3] Ibid 167, 168.

[4] Ibid 169-173. 21 Ed. I., Bp. Bek declined to comply with the Statute of Gloucester. Hugh de Cressingham and his fellow justices in eyre seized the bishop's franchise. Thereon he appealed to Parliament and it was admitted that the seizure was illegal (Registrum Dunelmense (R.S.) I. xl, xli; III. xv-xvii; P.Q.W. 604, 605). At the beginning of the 13th century the supremacy of the crown was admitted by the practice of craving court in a civil action before the royal justices, and of petitioning for the pleas of the crown. These marks of dependence had been dropped at the end of the 13th century, Lapsley 172, 173.

The judicial system of the county palatine was, as Bacon said, "a small model of the great government of the kingdom." There are a central court of pleas, and a body of justices, who sit by virtue of commissions of assize, oyer and terminer, and gaol delivery.[1] The bishop's council acts as a court of appeal from the central court and from the justices, and has also an original jurisdiction.[2] The bishop has his Chancery; but we do not find that it becomes a court with equitable jurisdiction much before the 16th century. In the 14th century it has a certain jurisdiction over cases which come before the council; and matters concerning the bishop's revenue were long determined in the Chancery sitting as a court of Exchequer.[3] In the 16th century we find that the Chancery is in the possession of an equitable jurisdiction. In 1523 Wolsey was bishop of Durham; and he reorganized the Chancery. We know that in Elizabeth's reign it was exercising an equitable jurisdiction.[4]

The judges who sat in the palatine courts were often the same persons as those who presided in the royal courts. For instance Walter de Merton was a justice itinerant and chancellor of the palatinate, and afterwards chancellor of England. This tended to assimilate the law of the palatinate to that of the kingdom. Statutes of the realm bound the palatinate. They were often interpreted in Durham by the same men who interpreted them at Westminster.[5]

In the same way we find that the development of the local courts in the palatinate closely follows the development of the local courts in the kingdom. The county court is superseded by the justices of the peace in Quarter Sessions.[6]

(ii) The period of decline after 1536.

In 1536 an act was passed for recontinuing liberties in the crown.[7] Under the provisions of that act the king alone can pardon crimes. Justices are to be appointed by the king. All legal proceedings are to be in the king's name. All fines and amercements are to belong to the king. The independent judicial system of the palatinate is preserved, but it is made to depend directly upon the king. The royal control was still further emphasized by the establishment of the

[1] Lapsley 174. [2] Ibid 181, 182. [3] Ibid 186-191.

[4] Ibid 189, 198. The history of the growth of the court is thus very similar to that of the High Court of Chancery, below 203, 204. [5] Ibid 175, 177.

[6] Ibid 178, 179, 195. 6, 7 Will. IV. c. 19 § 2, put an end to the county court of the palatinate. Its jurisdiction was vested in the sheriff of the county with the same powers as sheriffs in other parts of England.

[7] 27 Henry VIII. c. 24. By § 21 the bishop is given all the powers of justice of the peace.

Council of the North. From 1522 to 1537 the counties bordering on Scotland were placed under the control of a lieutenant and council; and most of the influential persons of the palatinate had their places on the council. After the Pilgrimage of Grace (1537) a permanent council with extensive powers was organized under the presidency of Cuthbert Tunstall, Bishop of Durham.[1]

After the Great Rebellion the palatinate was formally abolished (1646); and the jura regalia were put into the hands of trustees. In 1649 it was joined to the northern circuit; and in 1654 it was assimilated to the position of an ordinary county.[2]

Under Charles II. the palatinate reverted to the position in which it had been before the outbreak of the Civil War. But it was no longer controlled by the Council of the North, which the Long Parliament had abolished.[3] In 1688 an attempt was made to put an end to the palatinate. It failed because the inhabitants of Durham were really benefited by their local courts.[4] The same cause procured the failure of a bill for the same object in 1836. But in that year an act was passed which separated the temporal from the ecclesiastical jurisdiction of the bishop, and vested the former in the crown as a franchise separate from the crown.[5] The existing judicial system of the palatinate therefore remained.

The court of Pleas was reorganized in 1839;[6] and it was regulated by the Common Law Procedure Acts.[7] It was merged in the High Court by the Judicature Act of 1873.[8] The new county courts had removed the former objection to its abolition. It was also provided that as respects the issue of commissions of assize and other like commissions the counties of Durham and Lancaster should cease to be counties palatine.[9]

The court of Chancery still survives. Its practice was

[1] Lapsley 259-263; Coke, 4th Instit. 245. Their commission gave both a criminal and civil jurisdiction, which Coke contended was contrary to law.

[2] Lapsley 198-200.

[3] 16 Car. I. c. 10.

[4] Lapsley 201. A writer of the 18th century violently attacked the judicial staff of the palatinate. "They are described as clergymen and tradesmen whose ignorance of law is sufficiently proved by the fact that one justice desired to see John Doe and Richard Doe in order to reprimand them for their litigiousness. Even the Bishop, when he once appeared on the bench, seems to have fallen into the same error," ibid 202, 203.

[5] Ibid 205, 206; 6, 7 Will. IV. c. 19.

[6] 2, 3 Vict. c. 16. Powers are given to make rules as to pleading and procedure and to adopt the rules of the courts of common law.

[7] 17, 18 Vict. c. 125 § 101; 18, 19 Vict. c. 67 § 8; 23, 24 Vict. c. 126 § 40. Below 407.

[8] 36, 37 Vict. c. 66 § 16. Below 410.

[9] 36, 37 Vict. c. 66 § 99.

regulated in 1889;[1] and it was provided that appeals from it should lie to the Court of Appeal, and from thence to the House of Lords.

*Lancaster.*

Coke dates the foundation of the county palatine of Lancaster from 1377.[2] In that year the king made the duchy of Lancaster a county palatine for the life of John of Gaunt. Henry IV. established the duchy as a county palatine severed from the crown because he felt that he held the duchy by a more secure title than he held the crown.[3] In Edward IV.'s reign it was, as so severed, annexed to the crown and to the heirs of the crown being kings of England. Henry VII. made a similar limitation.[4]

The act of 1536 applied to Lancaster; but it was provided that appointments to judicial offices should be under the seal of the duchy.[5]

The courts of the county were a court of common pleas; justices of assize, gaol delivery, oyer and terminer, and of the peace; a chancery court for the county palatine presided over by a vice-chancellor; and a court of Duchy Chamber,[6] presided over by the chancellor of the duchy, which sat at Westminster and heard appeals from the chancery court of the county palatine.[7]

The Judicature Act of 1873[8] merged the court of common pleas in the High Court, and stopped the issue of commissions of assize and other like commissions. But, as in the case of Durham, the court of Chancery survived the judicature acts. It was regulated in 1850[9] by an act which practically assimilated its procedure to that of the High Court of Chancery. In 1854[10] appeals to the court of Duchy Chamber were directed to be heard by the chancellor of the Duchy and two lords justices of appeal. In 1890[11] the court of Chancery was brought into closer connection with the judicial system of the country, and fresh arrangements were made

[1] 52, 53 Vict. c. 47.

[2] 4th Instit. 204. But apparently 26 Ed. III., Henry, Duke of Lancaster, had had a similar grant.

[3] On the same principle Henry V. severed from the crown the possessions which he took as heir to his mother and annexed them to the Duchy (ibid 206).

[4] The effect of these limitations was exhaustively discussed in 1562 in the case of the Duchy of Lancaster (Plowden 212).

[5] 27 Henry VIII. c. 24 § 5.

[6] This court had jurisdiction over an area wider than that of the county palatine as it comprised parts of the city of Westminster, Bl. Com. iii 78; Fisher v. Patten (1673) 2 Lev. 24.

[7] Coke, 4th Instit. 204. The chancellor was assisted by two judges of assize, see 17, 18 Vict. c. 82.

[8] 36, 37 Vict. c. 66 §§ 16 and 99. Below 410.

[9] 13, 14 Vict. c. 43.

[10] 17, 18 Vict. c. 82.

[11] 53, 54 Vict. c. 23.

for the hearing of appeals. The court of Chancery of the county palatine was given the same jurisdiction as the Chancery Division of the High Court; and appeals from it were directed to go to the Court of Appeal and the House of Lords. The court of Duchy Chamber has thus ceased to exist. The Chancellor of the Duchy is no longer a judicial officer.[1]

*Chester.*

Chester is a county palatine by prescription. It was conferred on Hugh Lupus, the nephew of William I. In Richard II.'s reign it was created a Principality, and it was enacted that it should, like Wales, always go to the king's eldest son.[2] It is, says Coke, the most ancient and honourable county palatine.[3] It possessed all the jura regalia; and its privileges were ascertained and certified by a resolution of the judges in Elizabeth's reign on the occasion of a controversy between the county palatine and the President and Council of Wales.[4] These privileges were affected, like those of the other counties palatine, by the act of 1536.[5]

The justice of Chester held a court for pleas of the crown and common pleas. An act of 27 Henry VIII. c. 5 gave to the Lord Chancellor or Lord Keeper the right to appoint justices of the peace and of gaol delivery for Chester and Wales. The chamberlain of Chester, assisted by a vice-chamberlain, exercised the equitable and common law jurisdiction of the Chancery, and the jurisdiction of a court of Exchequer.

The palatine jurisdiction both of Chester and Wales came to an end in 1830. By an act passed in that year[6] an additional puisne judge was added to the Courts of Common Law, and it was provided that the jurisdiction of those courts should extend to Chester and Wales. The existing separate courts in Chester and Wales were abolished; and it was provided that assizes should be held in Chester and Wales as in other parts of England.

*Wales.*

In 1284[7] by the Statutum Walliæ six counties—Angelsea, Carnarvon, Merioneth, Flint, Carmarthen, and Cardigan—

[1] He appoints and dismisses the county court judges, looks after the land revenues of the Duchy, and keeps its seal. Practically the office is a sinecure. Anson, The Crown 188, 189.

[2] 21 Rich. II. c. 9. [3] 4th Instit. 211. [4] Ibid 212, 213.

[5] 27 Henry VIII. c. 24. [6] 11 Geo. IV., 1 Will. IV. c. 70.

[7] 12 Ed. I. St. 1. See on the whole subject Stephen, H.C.L. i 138-144; Coke, 4th Instit. 239; Hargrave's Law Tracts i 378, Against the jurisdiction of the King's Bench over Wales by Process of Latitat.

were created in Wales and organized on the English model. All of them were placed under the justice of Snowdon.

The rest of Wales, including Monmouth, parts of Shropshire, Hereford, and Gloucester, were under the Lords Marchers. They were hereditary rulers who had received extensive grants of jura regalia in return for their efforts in conquering and governing the country. In Edward III.'s reign it was enacted that they should be considered as part of England.[1] Neither the counties nor the Lords Marchers were subject to the jurisdiction of the ordinary Courts of Common Law, appeals as a general rule being to Parliament. It was only in the case of a writ of Quare Impedit, or where a Lord Marcher was a party that the King's Bench had any jurisdiction.[2] The justice of Snowdon was not under its control.[3] In a statute passed in 1536, 137 Lords Marchers are enumerated.[4] By that statute they are annexed some to adjacent Welsh, others to adjacent English counties, and others are formed into five new counties.[5]

In 1543[6] there was passed a comprehensive measure for the regulation of the judicial system of Wales. The country was to consist of twelve counties divided into hundreds. The counties were divided into groups of three. A court of Great Sessions was to be held twice a year in each group. The judge of one group was the justice of Chester, of a second, the justices of North Wales, of the other two, two persons to be appointed by the crown.[7] In each county there were established sheriffs,[8] justices of the peace, quarter sessions,[9] coroners,[10] county courts, tourns, and hundred courts.[11]

An appeal was provided from the Great Sessions to the court of King's Bench in real and mixed actions;[12] in personal actions to the President and Council of Wales, the jurisdiction of which was recognized by the act of 1543.[13]

[1] 28 Ed. III. c. 2. Stephen, H.C.L. i 141, 142 cites a case from Coke's entries (549-551) which illustrates the extent of their jurisdiction.

[2] Hargrave i 395, 403-405. He quotes at p. 403 Y.B., 32 Henry VI. Hill, pl. 13, in which Wales is distinguished in this respect from the ordinary county palatine. Fortescue, C. J., says, "At some time Chester, Lancaster and Durham were at common law, and although the king has made them counties palatine, as he well may without Parliament, yet the king without Parliament cannot *prendre son lige home de droit*; but no process can be made nor ever was made to Wales or to Ireland, notwithstanding they are under the king's obeisance."

[3] Ibid 392, 411. [4] 27 Henry VIII. c. 26.

[5] Brecon, Radnor, Montgomery, Denbigh (Welsh), and Monmouth (English).

[6] 34, 35 Henry VIII. c. 26. [7] §§ 2-9. [8] § 61.

[9] §§ 53-60. [10] § 68. [11] §§ 73-76. [12] § 113.

[13] §§ 4 and 113; Coke, 4th Instit. 242.

It was provided that for urgent cause process might issue out of England.[1]

The act seems to have had the same effect on the franchises of the Lords Marchers as the organization of the Curia Regis had upon the English franchises in the 13th century. Their privileges had been saved in 1536 and 1543.[2] But we find a complaint in 1554[3] that there was a doubt whether this saving operated in favour of the heirs and successors of the existing Lords Marchers. The statute passed in that year secured to them the half of certain forfeitures incurred by their tenants "to be paid by the hands of the sheriff," and such profits as they were formerly accustomed to have. Their once wide jurisdiction seems to have sunk to certain pecuniary rights, and to franchises of the dead or decadent type.[4]

In 1688 the President and Council of Wales was abolished, and its jurisdiction in error was conferred on the court of King's Bench.[5]

The separate judicial organisation of Wales came to an end, as we have seen, in 1830.[6]

*The Stannary Courts.*

The Stannaries were districts in Devon and Cornwall in which mining operations were carried on.[7] All over Europe the sovereign was regarded as having a peculiar interest in mines. In England the crown is entitled by virtue of its prerogative to mines of all precious metals; and perhaps at an earlier period its claims were more extensive.[8] The exact extent of the Stannaries was never definitely ascertained. They can only be described as the districts where the mines were situate, and where, therefore, the crown possessed certain rights.[9]

[1] § 115; Hargrave i 413-416. It was doubtful whether process by Latitat (below 87-89) ran in Wales till 1779; 1 Wils, 193, 202; 1 Dougl. 202.

[2] 27 Henry VIII. c. 26 § 30; 34, 35 Henry VIII. c. 26 § 101, recites that many have come into the king's hands "by suppressions of Houses by purchase or attainders," and enacts that no more shall be for the future created.

[3] 1, 2 Ph. and Mar. c. 15 §§ 1-4.

[4] § 6 "Courts Baron, Courts leet and lawdays and all . . . things to the same courts belonging: and also . . . all such Waife, Straife, Ingfangthefe, Outfangthefe, Treasure trove, deodands, Goods and Chattels of felons, . . . all such Wreck *de mere*, Wharfage and Customs of Strangers" as their ancestors had.

[5] 1 Will. and Mar. c. 27. That court by the process of Latitat had still further encroached on the powers of the Welsh courts, Hargrave i 423.

[6] Above 55.

[7] See derivation in Jacob, Law Dictionary *sub. voc* Stannaries.

[8] Plowden, Case of Mines at p. 327; Vice v. Thomas (Ed. Smirke 81-87). It is clear from the extracts from the Close and Patent Rolls cited at pp. 115-123, that up to the reign of Edward III. the king claimed mines of lead and tin.

[9] Vice v. Thomas 96; MacSwinney, Mines (Ed. 1897) 486 n.

The peculiar position of these mining districts caused their peculiar organization. Although the Stannaries were the most important of such districts, they did not stand alone. We find that in Derbyshire and in other places where mining was carried on, the miners have their own courts and their own customs.[1] To the legal historian, however, the Stannaries are the most important of these districts, because the extent of the jurisdiction conferred upon the Stannary courts gives to them a character which resembles that of the other Palatine jurisdictions.

As was the case with the other Palatine jurisdictions, the wide powers of the Stannary courts were only gradually acquired. The earliest charters conferring jurisdiction are of the reigns of Richard I. and John.[2] They seem to confer upon the Stannary Officials a right of exclusive jurisdiction over the miners. The reason assigned is that the Stannaries and the miners are the peculiar property of the crown. But the terms in which the jurisdiction is conferred are vague.[3] A more comprehensive charter was granted in Edward I.'s reign (1305). It confers upon the Stannary courts jurisdiction in all cases except cases which touch land, life, or limb.[4] But even in this charter the exact extent of the jurisdiction so conferred, and the persons subject to it, are not clearly defined. In answer to a Parliamentary petition in Edward III.'s reign (1377) a commission was issued to enquire into these matters. But it does not appear to have reported the result of its enquiries.[5] The charter of Edward I. was confirmed many times;[6] but it was not till 1640 that the limitations of the Stannary jurisdiction were settled in accordance with previous resolutions of the judges in

[1] For the Barmote Court in Derbyshire see MacSwinney 572-589; 14, 15 Vict. c. 94; 15, 16 Vict. c. clxiii; Encyclopædia of Law *sub. voc* Barmote. For other customs at Penrith, Alstor, in the Forest of Mendip and the Forest of Dean, see Vice v. Thomas 123-132.

[2] For Richard's Charter see Harrison, Report on the Laws and Jurisdiction of the Stannaries 6; for John's Charter, Vice v. Thomas 8.

[3] According to John's Charter the Stannatores are to be "liberi et quieti de placitis nativorum dum operantur ad commodum firmæ nostræ . . . quia Stammarie sunt nostra dominica." The Chief Warden and his bailiffs are to have, "plenariam potestatem ad eos justificandos et ad rectum producendos, et quod ab eis in carceribus nostris recipiantur, si contigerit quod aliquis prædictorum Stannatorum debeat capi vel incarcerari pro aliquo retto. Et si contigerit quod aliquis eorum fuerit fugitivus vel utlagatus, quod catalla eorum nobis reddantur per manum custodis Stannariarum nostrarum; quia Stannatores firmarii nostri sunt et semper in debito (qu. dominico) nostro."

[4] Coke, 4th Instit. 233; Pearce, Laws of the Stannaries 186-188.

[5] Coke, 4th Instit. 232-236; Vice v. Thomas 29 n. g. It is said there that in one of the Maynard MSS. (no. 63) in Lincoln's Inn it is stated that the articles were found against the tinners.

[6] 8 Rich. II.; 1 Edward IV.; 3 Henry VII; Pearce 185.

the 17th century.[1] It was enacted[2] (1) that the jurisdiction extends to any "vill, tithing, and hamlet where some tinwork in work is situate, and not elsewhere, and no longer than the same tinwork is or shall be in working"; (2) working tinners can always be sued in the Stannary courts by working tinners; (3) foreigners can only be sued in the Stannary courts if the plaintiff is a working tinner and the cause of action arose in the jurisdiction, or concerned tin work; (4) in such cases the tinner may, if he pleases, sue the foreigner at common law.

In Richard I. and John's reigns the Stannaries were in the hands of the crown. They were granted in Henry III.'s reign to the Duke of Cornwall, and in Edward II.'s reign to Piers Gaveston. By a grant made in Edward III.'s reign the duchy of Cornwall and the Stannary jurisdiction were vested in the eldest son of the king.[3]

The chief Stannary official was the Lord Warden, appointed by the Duke of Cornwall, who is generally also Prince of Wales. The Lord Warden appointed a Vice-Warden and Stewards. The Duke appointed bailiffs for each Stannary, who were the executive officers of the Stannary courts.[4] The Stannary courts in Devonshire were held at Chagford, Ashburton, Plympton, and Tavistock.[5] The Stannary courts in Cornwall were held at Truro (for the district of Tynwarhayle), at Lostwithiel (for the district of Blackmoor), at Launceston (for the district of Ferrymoor), and at Helston (for the districts of Penwith and Kerrier).[6] They were held by the Stewards from three weeks to three weeks. They had a leet jurisdiction,[7] and a general common law jurisdiction, except in cases of land, life, and limb.[8] The cases were heard by a jury of six.[9] An appeal lay to the Steward.

From the Steward an appeal lay to the court of the Vice-Warden, and from thence to the Lord Warden, and from him to the Prince's council. It was settled in 1562 that the ordinary courts of law had no jurisdiction in error.[10]

[1] Coke, 4th Instit. 229-231; Pearce 147-151.
[2] 16 Car. I. c. 15.
[3] Vice v. Thomas 13, 17, 20.
[4] Ibid 97.
[5] Pearce 189.
[6] Vice v. Thomas 96.
[7] Pearce 152 gives the charge of the Steward at the leet. This jurisdiction was exercised chiefly at two specially full courts in the spring and autumn, Vice v. Thomas 97; below 63 n. 1.
[8] Vice v. Thomas 95. The early records were destroyed in 1644, Pearce xxiv. It is stated in Harrison, Report, etc. (1835), that there were no records prior to 1752. Pearce who wrote in 1725 had certainly access to earlier records than this.
[9] A decision in 1632 (Cro. Car. 259) that this was illegal was disregarded.
[10] 4th Instit. 229, 230; 7 Mod. 103.

In the 16th century the court of the Vice-Warden acquired a jurisdiction in equity.[1] It is clear that this jurisdiction could not be grounded upon the ancient Stannary Charters. But the Stannary courts, like the courts of the counties palatine, showed a capacity for assimilating and applying the developments of royal jurisdiction. Probably the equitable jurisdiction of the Vice-Warden was like the equitable jurisdiction of the Chancellor, founded upon applications for relief made to the Prince's council.[2] Though occasionally doubted the jurisdiction was constantly exercised and finally adjudged to be legal in the case of *Vice* v. *Thomas*.[3]

In addition to these courts the Stannaries possessed Parliaments consisting of twenty-four persons chosen from each of the four Stannary towns in each county. They enforced old laws and promulgated new laws relating to mining matters. The Stannary Parliament for Devonshire met at Crockentor.[4] The Cornish Parliament, established in 1508, possibly on the model of the Devonshire Parliament, usually met at Lostwithiel.[5]

The Devonshire Stannary courts seem to have disappeared, and in the 19th century their very existence seems to have been forgotten.[6] We shall see that it is not till 1856 that they were reconstituted by statute.

The Cornish Stannary courts on the other hand have had a continuous history. From the various laws passed by the Stannary Parliaments in the 16th and 17th centuries we can gather that the abuses often attendant on small courts were present. We hear complaints of maintenance and champerty, and of covinous compacts between bailiffs and defendants. We hear of demands that only duly licensed counsel should be employed, that Stewards should not be of counsel with the parties.[7] Things did not grow better in the 18th century. The procedure of the courts remained archaic. It was said at the beginning of the 19th century that from eighteen to

[1] It is clear that he then was reputed to have this jurisdiction, Vice v. Thomas 15-24; Carew, Survey of Cornwall 17; Bacon, Argument on the Jurisdiction of the Marches, is sometimes cited; but his words do not apply to the court of equity in the Stannaries, Works vii 602, 603. At the beginning of the 17th century the common law courts seemed inclined to dispute the jurisdiction, Pearce 147-151. In Trelawny v. Williams (1704) 2 Vern. 483 the legality of the court was questioned.

[2] See instances of such applications printed in the account of Vice v. Thomas 25, 27.

[3] At p. 36.

[4] There were Parliaments 2 Henry VIII.; 24 Henry VIII.; 25 Henry VIII.; 6 Ed. VI.; 16 Eliza, Pearce 189-240.

[5] Pearce 21-86; Vice v. Thomas 48-57.

[6] Re South Lady Bertha Mining Company (1862), 2 J. and H. 380, 381.

[7] Vice v. Thomas 53-55; Pearce, Act 25 of the Parliament of 1685 (48-61).

twenty-one weeks was the shortest period within which a simple debt could be recovered. If the case was doubtful the period was still longer.[1] In addition many complaints were heard of the negligence of the Stewards.[2] It was in fact easier to recover a debt through the medium of the ordinary Common Law Courts. Wherever possible this course was pursued. But if the debt was under 40s., or if the case fell within the exclusive jurisdiction of the Stannary courts, this expedient was not available. In consequence a custom had sprung up in the 18th century of beginning a common law action in the court of the Vice-Warden.[3] The ordinary Stannary courts were left with so little business that they were all consolidated into one.[4] In 1824 it was decided by the court of King's Bench that the court of the Vice-Warden had no such original common law jurisdiction.[5] This decision produced a practical cessation of Stannary jurisdiction, because it closed the one effective court still existing. So many inconveniences were found to result from this, that Parliament in 1836[6] placed the jurisdiction of the Stannary courts upon a new and improved basis.

It was enacted that the court of the Vice-Warden should have a concurrent equity and common law jurisdiction. His jurisdiction was extended over metals other than tin. Appeals were to be taken to the Lord Warden assisted by three or more members of the Judicial Committee of the Privy Council.

In 1856[7] the powers of the Vice-Warden's court were further extended. It was provided also that he should have jurisdiction over the Stannaries of Devonshire.

The court of the Vice-Warden survived the Judicature Act of 1873; but the court of the Lord Warden was merged in the Court of Appeal created by that act.[8]

In 1896[9] the court of the Vice-Warden was abolished and its powers were transferred to such of the new county courts as the Lord Chancellor might direct.

(2) The lesser franchises.

The Quo Warranto enquiries resulted, as we have seen, in confirming the title of the holders of franchises if they could show that they had enjoyed them from the first year of Richard I.'s reign.[10] There were many varieties of such franchises. We find those conferred by the old Saxon terms,

[1] Harrison, Report, etc. 92 [2] Ibid 106, 107. [3] Ibid 93.
[4] Ibid 160, 161. [5] Ibid 15, 16. [6] Ibid 112, 113; 6, 7 Will. IV. c. 106.
[7] 18, 19 Vict. c. 32. [8] 36, 37 Vict. c. 66 § 18. [9] 59, 60 Vict. c. 45.
[10] Above 49.

sac and soc, toll and team, infangtheft and outfangtheft. We find that hundreds are granted to private individuals. We find also grants of returnus brevium, amerciamenta hominum, catalla felonum, the right to hold fairs, the right to appoint coroners, and, most common of all, the view of frankpledge, to which there is usually attached the right to hold the assize of bread and beer.[1]

But these lesser franchises tend to become of gradually less importance. This is due chiefly to two causes. (1) Though the verdicts of the juries would lead us to suppose that they were on the whole popular in the time of Edward I., they gradually lose their popularity.[2] Further grants are made the subject of protests in Parliament. Their creation is a grievance of the same character as the letting to ferm of hundreds at excessive rates. We have, for instance, in Edward III.'s reign[3] a complaint that the king has granted to the count of Arundel and Surrey the two sheriff's tourns in the rapes of Cicester and Arundel. The count has set up within them a new court held from three weeks to three weeks which he calls a shire court. Pleas which ought to be pleaded in the county court are there pleaded; and the annual profit is £30. Besides the king has granted the count a certain rent which they assert belongs to the county, and yet the county pays the same ferm as before. The franchise jurisdiction is therefore attacked from two sides. It is obnoxious to the crown and it is disliked by Parliament. (2) The new processes of the Courts of Common Law, the new jurisdiction of the judges of assize and the justices of the peace worked more smoothly. The procedure of the old courts is archaic. They decline for much the same reasons as the county and hundred courts decline.[4] They do however survive. There are many mentions of their existence in Coke's Entries.[5] In many cases the title of the holder, called in question by a writ of Quo Warranto, is allowed to be good. But they tend more and more to become merely interesting survivals, such as the Halifax gibbet law,[6] which recall the old customs of the days before the common law.

[1] P. and M. i 567-571. [2] Select Pleas in Manorial Courts lxxvii n. C.

[3] Rot. Parl. ii 348 no. 147. In Edward III.'s reign the crown continued to make frequent use of the procedure of Quo Warranto as can be seen from Keilway's reports, Reeve H.E.L. ii 429 n. a. [4] Above 42, 44.

[5] 443 b (22 Eliza.); 540 b. They were sometimes used by lords against their villein tenants in the early part of the 16th century, Select cases in the Court of Requests (S.S.) lxix.

[6] Stephen, H.C.L. i 265-270. It is said by Palgrave to be the last vestige of the law of infangtheft. Cp. also the Court of the Liberty of the Savoy (ibid 270-272);

It has never been the practice of the English statesman to rudely abolish institutions merely because they are decaying, provided they do not constitute a practical grievance. Moreover a franchise is a species of private property and must therefore be tenderly treated. Hence we find that certain of the franchises are in practical use even at the present day. The commonest of these franchises in the 13th century is, as we have said, the view of frankpledge or the court leet.[1] This means that the sheriff's right to hold his tourn in some particular hundred is excluded and the right to hold the court is given to a private person. To this right is usually joined the right to hold the assize of bread and beer.[2] So usual was this franchise that books of practice on the court baron usually contain instructions as to holding the view of frankpledge.[3] Coke says that the leet or the view of frankpledge was derived out of the sheriff's tourn.[4] But whether or not this is the case, it has survived the tourn. The right was valued because it gave to the lord of a manor the power of preventing the sheriff from enquiring into the doings of the inhabitants of his immediate neighbourhood. Because it was a species of private property it was not allowed to fall into the same desuetude as the tourn. Statutes of the 16th, 17th and 18th centuries recognise its existence and confer duties upon it.[5] Cases of the 17th, 18th and 19th centuries enforce the performance of the duties which it entails and the rights which it confers.[6]

The long life of some of these franchises is attested by modern statutes. The County Court Acts, 1846-1888,

we see there the leet or frankpledge jurisdiction in working order, above 43, 44. Stephen (ii 119) says that small villages in Kent have charters by virtue of which they might try people for their lives—but that those powers have been forgotten.

[1] For the derivation of the word leet see Select Pleas in Manorial Courts lxxiii n. A. It is an East Anglian word. The style of the court is "curia visus franciplegii tenta apud B. coram A.B. senescallo." (1681) 1 Free. 525, an indictment in court leet held good, though the style of the court was "curia V.P. cum curia Baronis," because the courts are held together.

[2] Ibid xxvii-xxxviii; P. and M. i 567-570.

[3] As to these books see the Court Baron (S.S.) 1 and 2.

[4] 4th Instit. 261.

[5] 4 Ed. IV. c. 1 § 6. 3; 14, 15 Hy. VIII. c. 10; 33 Hy. VIII. c. 9; 7 Ed. VI. c. 5 § 6; 2, 3 Ph. and Mary c. 8; 31 Eliza. c. 7; 2 Jac. I. c. 5; 21 Jac. I. c. 21; 14 Car. II. c. 12 §§ 14, 15; 11 Geo. I. c. 4 § 3. In many cases duties are imposed on the leets which over the rest of the country are imposed on the justices of the peace. 27 Henry VIII. c. 24 § 14 the statutes in force against sheriffs, undersheriffs and bailiffs are to be in force against the stewards and other officers of liberties.

[6] Queen v. Jennings (1711) 11 Mod. 215, indictment for refusing to serve as high constable; Colebrook v. Elliot (1766) 3 Burr. 1859, debt for an amercement set and affeered in the leet of manor of Stepney; Davidson v. Moscrop

recognise the vested interests of lords of hundreds.[1] The Sheriffs Act of 1887 recognises the existence of the leet;[2] and it is obliged to contemplate, just as the assize of Clarendon was obliged to contemplate, the liberty into which the sheriff has no right to enter.[3]

(3) The feudal courts.

We have seen that in the 12th century a lord *qua* lord has the right to hold a court for his tenants.[4] In spite of the attempt made in Magna Carta to preserve some part of the jurisdiction of these courts,[5] they have become in the course of the 13th century of gradually less importance. This is due chiefly to three causes.

(i) The feudal principle would have led to a series of courts one above the other. The higher courts would have been the courts of provinces. This happened on the continent; and we see in England from the Petition of the Barons (1258) that a series of these courts one above the other is known.[6] We can also see that large landowners sometimes hold one court for their extended possessions. The abbot of Ramsey kept a court for his larger freehold tenants at Broughton.[7] The suitors come from Lincolnshire, Norfolk, Suffolk, Bedfordshire, Hertfordshire, and Northamptonshire. The abbot of Gloucester adopted a similar system.[8] The Bishop of Ely had a council for which as we have seen cases of difficulty are reserved.[9] But the dominions of the greater landowners were scattered. Great feudal courts for a large dominion are made impossible by considerations of time and space. The same causes which have made the lesser franchises the most common, operate to make the feudal courts the courts of small districts. At the same time to the men of that age feudal jurisdiction was the natural jurisdiction. "It is not very rare," says Professor Maitland, "to find the lord of a manor owing suit to a court many miles away."[10] But it is clear that under these circumstances suit of court was a

(1801) 2 East 56, custom of a leet held bad; King v. Adlard (1825) 4 B. and C. 780, liability to serve as constable; Willock v. Windsor (1832) 3 B. and Ad. 43, right to examine measures; King v. Lord of Hundred of Milverton (1835) 3 Ad. and Ell. 284, mandamus to compel lord of a hundred to hold a court leet.

[1] 9, 10 Vict. c. 95 §§ 11, 13, 14; 51, 52 Vict. c. 43 § 6.

[2] 50, 51 Vict. c. 55 § 40.

[3] Ibid §§ 10. 2, 34, 35.

[4] Above 16.

[5] Above 28, 36.

[6] Stubbs, Sel. Ch. 386, 387 (§ 29). The complaint is that when the "capitalis dominus" has made default, the "superior capitalis dominus" craves his court and has it; and if he makes default the "alter superior dominus" craves his court and has it—"et sic de singulis capitalibus dominis quotquot fuerint superiores."

[7] Select Pleas in Manorial Courts (S.S.) xlv.

[8] Ibid xlv, xlvi.

[9] The Court Baron (S.S.) 111.

[10] Select Pleas in Manorial Courts (S.S.) xliv.

serious burden. We are not, therefore, surprised to find that liability to suit was a pressing question. There seem to have been two views held upon the matter. According to the first, which is supported by Bracton, suit cannot be claimed in the absence of express stipulation, unless the business of the court in some way concerns the king. According to the second, all tenants, because they are tenants, owe suit to their lord's court.[1] The first theory was that adopted by the provisions of Westminster[2] and the Statute of Marlborough (1267).[3] The tenant must be specially bound to do suit, or his ancestors must have done the suit within the last 39 years; otherwise the suit cannot be claimed. On a division of the property the liability to suit is not increased. If part of the land held by service of the suit comes to the lord the liability disappears. It is clear that the attempt to make great feudal courts has been given up.

(ii) Such courts were not in fact needed. The growth of the jurisdiction of the king's court had the same effect upon the feudal courts as it had upon the communal courts. The king's court had assumed jurisdiction over all the more serious crimes, over all disturbances of seisin, over ownership of freehold land if the tenant put himself upon the Grand Assize. Magna Carta might ordain "that the writ præcipe shall not issue so that a man shall loose his court";[4] but the growth of writs of entry furnished new remedies which fell exclusively within the jurisdiction of the king's court.[5] In later times by writs of pone, recordari facias, or accedas ad curiam,[6] the plaintiff or the tenant could bring the matter

[1] Select Pleas in Manorial Courts (S.S.) xlviii-l; Bracton ff. 35, 35 b. "Sunt enim servitia et consuetudines quæ pertinent ad dominum fœdi, et consuetudines et servitia, quæ pertinent ad regem, sicut sectæ ad justiciam faciendam per breve de recto, et ad pacem, sicut de latrone judicando, et pro aforciamento curiæ in prædictis . . . Item sunt quædam servitia quæ pertinent ad dominum capitalem . . . et de quibus oportet quod fiat mentio in scriptura et alioquin peti non poterunt ut si dicatur faciendo sectam ad curiam domini sui."

[2] Stubbs, Sel. Ch. 401 (§ 1).

[3] 52 Henry III. c. 9; Coke, 2nd Instit. 116; appropriate writs "contra formam feoffamenti," and, on a division of the property, "de contributione facienda" are provided.

[4] § 34.

[5] Writ of entry "sur disseisin in the post," 52 Hy. III. c. 29; Select Pleas in Manorial Courts lv, lvi; P. and M. ii 70.

[6] The tenant can remove the case from the lord's court by accedas ad curiam into the Common Pleas (App. IX, B): the demandant must get a writ of tolt (App. VIII) to take it into the county court (above 41). When there the tenant can remove it by a recordari into the Common Pleas, or the demandant by a pone. If the tenant wishes to remove it from the county court by pone he must show cause in the writ. F.N.B. 7-9. The writ of False Judgment directed to a court Baron is called "accedas ad curiam": directed to the county court it is "recordari facias loquelam," below 77; App. IX, A and B. Hengham in Ed. I.'s reign said (Magna c. 3) Parvum seu nullum dominis curiarum in hujusmodi placitis tenendis proficuum aseribitur.

before the same tribunal; and even the mere insertion of the words "quia dominus remisit curiam," whether or not such waiver had actually been made, would enable an action for lands to be begun directly in the king's court.[1] We find in fact that the lords are obliged to make use of the procedure of the king's court to force their tenants to perform their services. By the Statute of Marlborough freeholders cannot be distrained to appear in court and to answer for their services without the king's writ.[2] They cannot be compelled to serve as jurors against their wills.[3] The older methods of proof, compurgation or battle, must be used unless both parties consent. The lord cannot make his court a court of error.[4] Jurisdiction in error is a matter exclusively for the king's court. With regard to personal actions the Statute of Gloucester in course of time restricted the feudal courts, as it restricted the communal courts, to be courts for very small matters.[5]

(iii) Feudalism has, as we have said, its two sides—its property side and its jurisdictional side. To use modern terms, it has affinities both with the law of real property and with constitutional law. But the king's court has, on the one hand, drawn from the lord the greater part of his jurisdiction; and, on the other hand, this same court, administering law common to the whole country, has spread over the whole country feudal conceptions of property in land. The English state is less feudal, but the English land law is more feudal than that of any other country in Europe. Hence we find that all the incidents of feudalism are regarded in a commercial spirit—they are looked upon as property. The military duties involved in tenure by knight service became obsolete.[6] The tenure is valued for the profitable incidents of wardship and marriage. The right of free alienation given by the Statute of Quia Emptores, the earliest legislation as to mortmain, the law of succession to real property, all point to this conclusion. The jurisdiction involved in feudalism gradually declines. It becomes merely appendant to land owning—a survival from the days when feudalism was more than merely an element in our real property law.[7] It is from this cause that the manorial jurisdiction of later law arises.

[1] F.N.B. 3; App. V, C.

[2] 52 Henry III. c. 22; Above 36 n. 1. Later attempts of "Lords and Ladies" to compel persons to answer for their freehold before their councils are put down by statute, 15 Rich. II. c. 12; 16 Rich. II. c. 2.

[3] 52 Henry III. c. 22; P. and M. i 581; Kitchin, Courts (Ed. 1653) 178, 225.

[4] Petition of the Barons (Sel. Ch. 386, 387) § 29; 52 Henry III. c. 19; Coke, 2nd Instit. 138. [5] 6 Ed. I. c. 8. Above 41. [6] P. and M. i 256.

[7] See on this subject "The decay of feudal property in France and England." Maine, Early Law and Custom, chap. ix.

(4) The manorial courts.

We have seen that in the 12th and 13th centuries the manor means a tract of land cultivated as an agricultural whole. We have seen that manors vary infinitely in size; but that the typical manor will consist of demesne lands, and of lands let to free and to villein tenants who have certain rights of common in the waste.[1]

In the course of the 14th and 15th centuries the manor comes to mean more than this. It not only denotes a certain tract of land held in a certain way, it connotes also jurisdiction. It is probable that the manor has gained this connotation by borrowing from the feudal principle. This is the theory suggested by Professor Maitland. He says that the "feudal principle was the rule of law, but that it had to work under such and so many limitations, some of law and some of fact, that the actual result was not very different from that which would have been produced by the manorial principle; so much so that in course of time it became possible to regard a private court (when not created by real or supposed grant from the crown) as never existing save as part of a manor."[2]

The process by which the term manor came to connote jurisdiction was exceedingly gradual. It would appear that even in Coke's day a manor was regarded as primarily a tract of land. He tells us that in the thirty-first year of Edward I.'s reign the king brought a Quo Warranto against the lady of S. to know by what warrant she claimed to hold the manor of C., and that this was the first Quo Warranto that was brought for lands.[3] In later law no doubt a Quo Warranto only lies to recover some usurped jurisdiction or franchise. But the law on that point was hardly settled in this way in Edward I.'s reign;[4] and in fact it was very far from being the first Quo Warranto ever brought for lands.[5]

[1] Above 19.

[2] Select Pleas in Manorial Courts xli.; L.Q.R. v. 127-130. To the last writs are directed to the lord *qua* lord of the land held by the tenant, not *qua* lord of the manor. The manor is not mentioned in such writs: the lands are described by reference not to the manor, but to the vill in which they are situate.

[3] 2nd Instit. 495.

[4] Bracton says a Quo Warranto lies to enable the heir to recover land retained in spite of a verdict in novel disseisin against his ancestor; the writ, he says, "in parte capit naturam mortis antecessoris et in parte novæ disseysinæ," ff. 284 b, 285; below 94, 95.

[5] Bracton's Note Book, cases 241, 268, 422, 750, 840, 862, 930, 1066, 1111, 1119, 1224, 1274, 1275, 1288; these cases were begun by the crown. Cases 35, 95, 219, 501, 1013, 1014, 1108, 1136, 1141, 1175, 1181, 1296, 1358, 1390, 1512, 1846 begun by a subject.

Coke's statement, however, and other cases of the 17th century on the question whether a Quo Warranto lay of a Court Baron, or a manor, show that even then the law was not quite clear how far a manor was merely property, how far it connoted jurisdiction.[1]

In the earliest records of manorial courts we find one court—the Court Baron—which freeholders and villeins alike attend.[2] But the differences between the freehold and villein tenants grew with time; and those differences survive when the villein of the 13th and 14th centuries has become the copyholder of the later 15th and 16th centuries. The freeholder can easily get his case tried in the king's court. He cannot be made to serve on a jury in the manorial court. He need not submit his case to the decision of a manorial jury. He will not be bound by bye-laws made by the court.[3] All the suitors of the court are his judges, whereas the lord's steward is the judge of the copyhold tenants.[4] All these causes tended to make the court of the freeholder look different from the court of the copyholder. Littleton, however, does not state that there are two courts in a manor. But Coke in his commentary on Littleton[5] says that the manor court is "of two natures; the first is by the common law, and is called a Court Baron, as some have said, for that it is the freeholders' or freemen's court . . . and of that court the freeholders being suitors be judges. . . The second is a Customary Court, and that doth concern copyholders, and therein the Lord or his Steward is the

[1] The King v. Stanton (1607) 2 Cro. 259, 260. "It was moved whether a Quo Warranto did lie of a Court Baron; for it is incident to the manor, and is not any liberty which the king can have distinct from the manor; and being of common right, the king cannot have a Quo Warranto thereof; and of that opinion was Fleming, C.J. Fenner doubted thereof: but Yelverton, Williams, and Coke held that a Quo Warranto well lies; for it is a matter of right to hold courts and to administer justice." The contrary opinion was intimated in the King v. Hulston (1725) 1 Stra. 621. There was a similar disagreement as to whether a mandamus lies against the steward of a Court Baron: the King v. Churchwardens of Kingsclere (1671) 2 Lev. 18; Stamp's Case (1667) 1 Sid. 40; the King v. Street (1723) 8 Mod. 98.

[2] P. and M. i 581. The style of the Court is "Curia Baronis E.C. Militis manerii sui prædicti tenta tali die etc. coram A.B. Seneschallo ibidem."

[3] P. and M. i 612-617. Thus it is said in the Doctor and Student, f. 14, that, though as a rule in courts of record the trial is by jury, "In other courts that be not of record, as in the county, court baron, hundred, and such other like, they shall be tried by the oath of the parties, and not otherwise, unless the parties assent that it shall be tried by the homage."

[4] Coke, 4th Instit. 268; 1st Instit. 58 a.

[5] 1st Instit. 58 a. Use of the Law (a tract erroneously attributed to Bacon, but probably of Bacon's time) mentions only one court, Bacon's Works vii 485.

judge."[b] From the statement that the court is of "two natures" it is an easy step to take to say that there are two courts in a manor—a Court Baron and a Court Customary.[1] But in the books which deal with the holding of the manorial court the distinction is by no means clearly drawn. Blackstone, though he says that they are "in their nature distinct," admits that they "are frequently confounded together."[2]

We can thus see how the notion sprung up that there are two courts in a manor. It is more difficult to understand how the rule sprang up that there can be no manor unless there are at least two freeholders.[3] If we admit that any freeholders are necessary to constitute a manor we can see why the number two is fixed upon. The suitors are the judges; and no man can be judge in his own case.[4] The difficult question to determine is why any freeholders are needed; for, in the 13th century there are clearly manors consisting only of villein tenements.[5] It is indeed admitted that a lord may have only copyhold tenants, and that he may hold a court for them. But then he has not a manor, but a customary manor.[6] How then did the notion arise that there is no true manor without freehold tenants?

Possibly a reason may be found in the fact that in the manor the law of property and the law of jurisdiction meet. A dictum unintelligible if we take either of these branches of law separately may be the intelligible though illogical result of both taken together.

Looking at the matter from the side of jurisdiction it appears that the manor contains within itself two kinds of jurisdiction—a jurisdiction over freeholders and a jurisdiction over copyholders. It might well be thought that jurisdiction over the freeholder was a kind of "liberty," which must exist by prescription in the absence of express grant;[7] while jurisdiction over copyholders was merely an incident to the

[1] Coke so states it in Melwich v. Luter 4 Co. Rep. 26 b; cp. 6 Co. Rep. 64 a.

[2] Comm. iii 33.

[3] Cases cited from Broke's Abridgement in Select Pleas in Manorial Courts lxi. In Bradshaw v. Lawson (1791) 4 T. R. 443 it was said that the rule as to two free suitors was so well settled that no cases need be cited to support it.

[4] Kitchin Courts 7

[5] See Select Pleas in Manorial Courts lxii-lxiv for a clear statement of the difficulty. P. and M. i 582.

[6] 4 Co. Rep. 26 b. "Although the lord by his own act cannot make of one and the same manor at the common law sundry manors consisting upon demesnes and freeholds, yet he may by his own act . . . make a customary manor consisting upon copyholders only, as to the purposes aforesaid. When the lord grants over the inheritance of his copyholds to another, the grantee may hold such court for the copyhold tenants only, as his grantor might." Cf. Lemon v. Blackwell (1680), Skin. 191.

[7] The King v. Stanton, above. 68 n. 1.

property absolutely necessary to its management. It would follow that a manor having as incident to it a jurisdiction over freeholders cannot be created by a private person.

Looking at the matter from the side of property a similar conclusion is reached. The freeholder's interest must have been created before Quia Emptores. That statute put an end to subinfeudation. If a man alienates freehold after that statute for an estate in fee simple he does not get tenants. His alienees hold, not of him, but of his lord. It is clear therefore that a man cannot create by his own act a manor which contains both freehold and copyhold tenants of the manor.[1]

But the freeholders were as the suitors of the Court Baron the most important class of the manor. If it comes to be said that a man cannot create a manor with such a court, either because he cannot create jurisdiction over freehold tenants, or because he cannot create freehold tenants holding of himself, it will not be long before it is said that a manor is not a manor without freehold tenants. Their presence thus becomes in later times the test of the existence of the manor. The lord may, it is true, aliene the seigniory of the copyholds; but then he will create merely a customary manor. The same convenient term will easily be applied to the case where all the freeholds have escheated. The lawyer begins to speculate as to the nature of the manor. It must be time out of mind. It can neither be created nor divided at the present day.[2]

There is in fact a substantial justification for the conclusion so reached. It is the presence of the freeholder—placed above mere manorial custom by the common law—which has sharply divided the inhabitants of the manor into two classes. The most important of these classes cannot be created by a private person. The lawyer may fairly ask is a manor a manor without its most important members? The common law has created, we may say, the peculiar status of the freeholder with reference both to property and to jurisdiction. In creating that status it has made a general feudal jurisdiction impossible. But it has created manorial jurisdiction. It

[1] Melwich v. Luter 4 Co. Rep. 26 b. So it is said by Kenyon, C.J., Glover v. Lane (1789) 3 T.R. 445, "to constitute a manor it is necessary not only that there should be two freeholders within the manor, but two freeholders holding of the manor *subject to escheats*." It is pointed out in Sir Moyle Finch's case, 6 Co. Rep. 64 a, that if there be a partition of the manor by act of law, e.g. the inheriting of two parceners, each may have a manor; cp. Marshe and Smith's case (1585) 1 Leo. 26; and Scriven, Copyholds (Ed. 1846) 7.

[2] Morris and Smith v. Paget (1585) 1 Cro. 38; Lemon v. Blackwell (1680) Skin. 191.

has tied down feudal jurisdiction to the tract of land called a manor. It may then be said that, historically, the freeholder is the essence, because he is the cause of the peculiar manorial jurisdiction of later law. The result may be called illogical; but a body of law, formed at the meeting place of the law of jurisdiction and the law of property, is likely to be called illogical by those who approach it from one only of these points of view.

We must now consider the constitution and powers of the manorial courts.

The lord's Steward usually presided over the manorial court, which was held from three weeks to three weeks. From the end of the 13th century he is usually a professional lawyer. The books which instruct these stewards in their duties are exceedingly technical.[1]

The business of the court baron of the manor was various. All kinds of personal actions (where the cause of action did not exceed 40s. in value) were tried there—contracts, trespass, libel, slander, assault, and some cases for which as yet the king's courts provided no remedy.[2] Actions for the recovery of freehold land, we have seen, were usually tried in the king's court. If begun in the manorial court they could be easily removed to the king's court, or the county court. In course of time the same processes could be used to transfer personal actions to the king's court.[3] The jurisdiction of the court declined for the same reasons as the jurisdiction of the other local courts declined. Blackstone says that it fell into disuse for the same reasons as occasioned the disuse of the hundred court.[4]

The proceedings in relation to copyhold tenements, which take place in the court customary of the manor, have been the part of the manorial jurisdiction which has had the longest history. Until the end of the 15th century the villein's or copyholder's interest was protected only in the manorial court.[5] The protection was fairly adequate. The custom which that court administered was a stable custom. It was stereotyped on the rolls of the manor court.[6] And,

[1] P. and M. i 580. A case is cited in which the post was offered to a man who had been a royal justice.

[2] The Court Baron (S.S.) 116-118. Two remarkable cases are noticed (Introd. 115) in which specific performance of a contract is granted. The court seems to have allowed actions on ordinary simple contracts before the king's courts regarded them as actionable. For cases of defamation in the Manorial Courts see L.Q.R. xviii 264-267.

[3] Bl. Comm. iii 33, 34.

[4] Ibid 35.

[5] P. and M. i 576.

[6] Above 38. The Court Baron (S.S.) 112.

from the 15th century onwards, the tenants were protected against their lords in various ways. Both the Common Law Courts[1] and the court of Chancery[2] interfered where the lord would not do right to those under his jurisdiction. Under the Tudors they were able to invoke the aid of the Court of Requests[3] and the Court of Star Chamber.[4]

Under these circumstances the jurisdiction of the court customary of the manor declined. All that it was used for was copyhold conveyancing business.[5] It is only in the court customary that the necessary formalities of surrender and admittance can take place.

The manor, so says the law, cannot exist without freeholders; but copyhold conveyancing business is all that is left to its court—a court which can be held by the steward or deputy steward out of the manor, and with no single tenant present.[6] Such a court is truly the vanishing point both of feudal and of manorial jurisdiction.

[1] Digby, R.P. (4th Ed.) 286-295; cp. Maine, Early Law and Custom 314-316.
[2] Spence, Equity i 336; Viner, Abridg. Chancery M. 2; English Hist. Rev. xvii 296.
[3] Select Cases in the Court of Requests (S.S.) liv-lxxii.
[4] Hudson 53, 54.
[5] P. and M. i 578, 579. It was probably for this reason that the notion of the customary manor sprang up.
[6] 57, 58 Vict. c. 46 §§ 82-85.

## CHAPTER III

## THE SYSTEM OF COMMON LAW JURISDICTION

IN this chapter some account will be given of the courts, central and local, which administered the common law after the older local courts had decayed. The courts which administered equitable rules, or the other distinct branches of law, which go to make up the general body of English law, will be dealt with in subsequent chapters. It will be necessary to describe both the constitution and the jurisdiction of these Common Law Courts; and, finally to describe the great distinctive feature of the common law system—the jury. The subject will fall under the following heads :—

I. The Common Law Courts.
II. The Itinerant Justices.
III. The Justices of the Peace.
IV. The Jury.

I. The Common Law Courts.

Before describing in detail the various courts of common law we may notice that the courts were royal courts and that judges of these courts were royal justices. From this three consequences followed. (1) The king had originally a large control over the business before the court. We have seen that in early days the king actually decided cases. There are instances of this in Henry III., Edward I. and Edward II.'s reign.[1] But when Fortescue wrote at the end of the 15th century it had ceased to be usual.[2] Coke merely stated the existing practice in answer to James I.'s claim to decide cases for himself.[3] Though the crown had thus ceased to take part in the proceedings of courts of law, he had many privileges and prerogatives in relation to such proceedings. It was claimed for him in James I.'s reign that he could peremptorily interfere to stop proceedings in any common law court by the writ Rege Inconsulto.[4] It was clear that he could sue in what court he pleased. In addition he had other

[1] Madox i 100; ii 10, 11; Palgrave, Commonwealth i 292.
[2] De Laudibus c. viii; Gardiner ii 39; below 80.
[3] Case of Prohibitions (1608) 12 Rep. 63, 64; cp. 3 S.T. 942.
[4] Brownlow v. Michill (1615) 3 Buls. 32; Bacon's Works vii 683-725.

smaller procedural advantages.[1] Perhaps the right of the Attorney or Solicitor General to reply in a criminal case, though the prisoner has called no witnesses, is one of the last surviving of that "garland of prerogatives"[2] which the older law gave to him. (2) The judges held their offices as a rule during the royal pleasure. The manipulation of the bench by the Stuarts led to the clause in the Act of Settlement[3] which provided that the judges should hold office "quamdiu se bene gesserint"; but that it should be lawful for the crown to remove them on an address by the two Houses of Parliament. (3) They vacated their offices on the demise of the crown. An Act of Anne provided that the judges, with other officers of the crown, should continue to hold their offices for a space of 6 months after the demise of the crown.[4] An Act of George III.'s reign[5] provided that the judges' tenure of office should be unaffected by the demise of the crown.

The following courts comprised the Courts of Common Law:—

1. The court of Common Pleas.
2. The court of King's Bench.
3. The court of Exchequer.
4. The court of Exchequer Chamber.

1. The court of Common Pleas.

We have seen that at the end of John's reign there was clearly a separation between the court which was fixed at a certain place to hear common pleas, and the court which followed the king with jurisdiction over both common pleas and pleas of the crown.[6] The two courts are not yet, however, completely distinct. We have not as yet two distinct bodies of judges with distinct duties. The distinction seems almost to depend upon the accident of there being a king to follow. During the minority of Henry III. there cannot be a court held coram rege. The king's presence is not as yet a legal fiction; and one court therefore tries all cases. When Henry attained his majority in 1234 the distinction between the two divisions of the Curia Regis again appears. We find

[1] Bacon op. cit. 693, 694; 700-702.

[2] Ibid 693. "In the pleadings and proceedings themselves of the king's suits, what a garland of prerogatives does the law put upon them."

[3] 12, 13 Will. III. c. 2 § 3. The commissions, however, of the Chief Baron and other Barons of the Exchequer were always "quamdiu se bene gesserint," Coke, 4th Instit. 117. After the Restoration some of the judges were, for a short time, appointed on similar terms, Campbell, Lives of the Chief Justices i 500.

[4] 6 Anne c. 7 § 8.

[5] 1 Geo. III. c. 23. Before the statute 1 Ed. VI. c. 7 all actions were discontinued by the demise of the crown.

[6] Above 34, 35.

a further and a more distinctive mark of the separation of the two courts in the fact that from this time they enrolled their proceedings on separate rolls. We get from this time the "Coram Rege," and the "De Banco" rolls.[1] A reported case of 1237[2] shows that the distinction between the two courts was well recognised. G. Marescallus was summoned to warrant the title to certain manors which the king was claiming against John Marescallus. He pleaded that this was a common plea, and could not therefore be heard "coram rege" in the court which followed the king. The court held that this was not a common plea, because it touched the person of the king and crown. Bracton says that the king has several courts.[3] Britton[4] and Fleta[5] mention the Bench as a separate court. In 1272 we hear of a separate chief justice of the Common Pleas.[6] From that date we may fairly say that the separation is complete. It is true that even in Edward I.'s reign it is not always possible to distinguish the court to which the different judges belong.[7] It is true also that the jurisdiction of the court was not then in all points the same as that which it afterwards possessed. "The special competence of each court is only vaguely defined."[8] But it is a court which has a separate set of rolls; it has a separate chief justice; it is inferior to the court which follows the king, since error lies from it to this court.[9]

Magna Carta provided, as we have seen, that the court should sit at some fixed place. That place was usually Westminster; but it occasionally sat elsewhere. In Edward III. and Richard II.'s reign we find it at York.[10] In Elizabeth's reign we find it at Hertford.[11] Indeed Edward III. when com-

[1] Select Pleas of the Crown (S.S.) Introd. xvi-xix; Bracton's Note Book i 56-59; P. and M. i 177; Foss ii 178; Madox i 793.

[2] Plac. Abbrev. 105. See Bracton's Note Book, Cases 1213, 1220.

[3] f. 105 b. "Habet rex etiam curiam et justitiarios in banco residentes," cp. f. 108 a.

[4] I. 5. "There be justices constantly remaining at Westminster, or at such other place as we shall be pleased to ordain, to determine Common Pleas according as we shall authorize them by our writs; and these justices shall have record of the proceedings held before them by virtue of our writs." [5] II. 2-7; II. 34.

[6] Gilbert de Preston, Dugdale, Orig. Jurid. 39; Foss iii 20.

[7] Foss iii 16, 17. [8] Bracton's Note Book i 56.

[9] Ibid and see case 1166 (A.D. 1235), "Et quia fuit ostensum Dom. Reg. ex parte abbatis quod ipsi justitiarii ita male processerunt vocati fuerunt coram Dom. Reg. et ibi cognoverunt quod ita processerunt." Case 1189, The abbot of Osney gives the king a palfrey to have a case before the J.J. at Westminster brought before the king and his council. The J.J. of either Bench might, however, assist one another by their advice even during the course of a case, Y.B. (R.S.) 13, 14 Ed. III. xli.

[10] Y.B. (R.S.) 11, 12 Ed. III. xxviii; 12, 13 Ed. III. xxxiii.

[11] 1 Co. Rep. 58 a.

plaint was made that the Bench "est errent de Countee en Countee per tout le Roialme," distinctly declined to deprive himself of the power to order the Bench to be where it pleased him;[1] and this power is clearly assumed to exist in one of the statutes of his reign.[2]

The judges of the court were always serjeants at law. "Coke, Fortescue and Dugdale clearly establish that in the case of the Common Pleas judges this rule existed from time immemorial, and that the rule was gradually extended to all the judges of the common law courts at Westminster."[3] In the 18th century the rule became somewhat of a form. The person whom it was desired to appoint assumed the degree of serjeant merely for the purpose of being appointed.[4] The rule itself was not altered till the Judicature Act.[5]

The jurisdiction of the court was chiefly over Common Pleas—that is over suits between subject and subject. Coke calls it the "lock and key of the common law in common pleas."[6] Common Pleas, however, did not comprise the whole of its jurisdiction. Its jurisdiction may be grouped under the following heads:—

(1) "Herein," says Coke, "are real actions, whereupon fines and recoveries (the common assurances of the realm) do pass, and all other real actions by original writs are to be determined, and also of all common pleas mixt or personal."[7] Such cases when tried by the itinerant justices under commissions of assize or nisi prius, might be adjourned into the Common Pleas, or removed into the court from which the nisi prius record came, *i.e.* into the Common Pleas or King's Bench.[8] This was the most important part of the jurisdiction of the court. It is this part of its jurisdiction which made its decisions the foundation, or, as Coke expressed it, the lock and key of the common law. "It is," says Mr Pulling,[9] "to the decisions of the Common Bench, before its jurisdiction was encroached upon by the judges of the other courts, that we must look back for the authentic version of those principles and doctrines which in time came to form

[1] 2 Rot. Parl. 286 no. 4 (38 Ed. III.); Ibid 311 no. 7 (46 Ed. III.); Reeves, H.E.L. ii 298. [2] 2 Ed. III. c. 11.

[3] Pulling, The Order of the Coif 94; Coke, 4th Instit. 100; Serjeants only had the right to be heard in this court till 9, 10 Vict. c. 54 gave equal rights to king's counsel and other barristers.

[4] Cf. 39 Geo. III. c.c. 67 and 113; Foss, Judges ix 65, 118-120.

[5] 36, 37 Vict. c. 66 § 8. [6] 4th Instit. 99. [7] Ibid.

[8] Below 117, 118, and Reeves, H.E.L. i 279 n. a. For instances where this adjournment took place on account of the turbulence of the districts see ibid i cvii n. 1. [9] Order of the Coif 92.

the actual law of real property in England. . . . There are few titles . . . which have not at one time or other been based on a Common Bench record, the record of a judgment actually given in matters litigated, or of a fine levied in a suit for land settled by final concord, or of a common recovery by default."

(2) The court possessed, also, a certain jurisdiction either to supervise or to correct the errors of the older local courts. This was an important part of its jurisdiction in the 13th and 14th centuries. It tended to become of gradually less importance with the decline of these local courts. We shall see that the control over the courts which took their place fell ultimately to the court of King's Bench.[1] By the writ of Pone[2] the court of Common Pleas could order a case to be transferred from the county court, the hundred court, or the court baron. By various writs of False Judgment[3] it could take cognisance of judgments given in courts not of record, i.e. the county court, the hundred court, or the court baron. If the judgment complained of were given in the hundred court the writ was called a writ of Accedas ad Hundredum;[4] if it were given in a court baron it was called a writ of Accedas ad Curiam.[5] By writ of error[6] it could take cognisance of judgments given in certain inferior courts of record. "A writ of error," says Fitzherbert,[7] "properly lieth where false judgment is given in any court which is a court of record; as in the Common Pleas, or in London, or other City, or other place where they have power to hold plea by the king's charter, or by prescription, in any sum in debt or trespass over the sum of 40s. And if false judgment be given in London or other place, which is a court of record, the party grieved shall have a writ of Error, and this writ may be returned into the Common Pleas, or in the King's

[1] Below 92. [2] App. VII. [3] F.N.B. 38-43; App. IX. [4] F.N.B. 42.

[5] Ibid 38. In both cases the sheriff must go to the court and enroll the proceedings and send up the record by the hands of suitors of the court.

[6] App. X.

[7] F.N.B. 44, 45; Bl. Comm. iii 410, denies that a writ of error lies from these inferior courts of record into the Common Pleas. He relies on Finch, Law 480. But the authority cited by Finch (Dyer 250) does not bear this out. The law, however, is so stated, Cro. Eliza. 26. But Vaughan, C.J. (Carter 222), says that it lay from inferior courts of record, but not from the assizes (below 121), (1 Leo. 55; 2 Leo. 107, 1 And. 12), though it was more politic to bring the writ at once in the King's Bench; but cp. Comyn's Digest Tit. Pleader 3 B. 2. In Bruce v. Wait (1840) 1 Man. and Gr. 1, error from the Recorder of Bristol was brought in the Common Pleas. See all the cases discussed at p. 2 n. a. of the report. The view of Fitzherbert is shown to be the right view. Cp. Darlow v. Shuttleworth L.R. 1902, 1 K.B. 721. For methods by which the court itself might correct its own errors see below 89-91.

Bench, at the pleasure of him who sueth the same." The proceedings on a writ of error were new proceedings. When the record was moved into the Common Pleas by virtue of this writ the plaintiff assigned errors. If the court thought there were errors he had a Scire Facias[1] against the defendant in error "ad audiendum errores." The defendant joined in error, and the matter was tried by the court.

(3) In certain exceptional cases the court of Common Pleas as well as the court of King's Bench could issue prerogative writs. It could issue a writ of Prohibition. "This court," says Coke,[2] "without any writ may upon a suggestion grant prohibitions to keep, as well temporal as ecclesiastical courts, within their bounds and jurisdiction." This was resolved in 1610 by the judges of the court of King's Bench and Exchequer. The judges of the court of Common Pleas were not called to take part in the resolution because they had often resolved this point before. It could also issue a writ of Habeas Corpus ad faciendum et recipiendum; "but that is or ought to be always where a person is privileged or to charge him with an action."[3] The power to issue this writ was in fact enlarged under cover of the fiction that the applicant was being sued in the Common Pleas. Statutes added to the jurisdiction of the court in this respect. 16 Car. I. c. 10 § 8 gave the court power to bail, discharge, or commit upon an habeas corpus when the prisoner was committed by the Council. 31 Car. II. c. 2 § 3 gave any of the judges of the court power to issue the writ in criminal cases. 56 Geo. III. c. 100 § 1 extended the power to other than criminal cases.

(4) The court had jurisdiction over its own officials. "In certain cases," says Coke, "this court may hold plea by Bill without any writ in the Chancery, as for or against any officer, minister, or privileged person of this court."[4] It could proceed, for instance, in this way against attornies practising before the court.

2. The court of King's Bench.

The court of King's Bench did not become a perfectly distinct court with a distinct body of judges and distinct

[1] For specimen of this writ see App. XI. B.

[2] 4th Instit. 99, 100. It had power to do so, though there was no writ of attachment or plea depending. In Henry VI.'s reign this had been apparently considered as a necessary condition for the exercise of this jurisdiction of the Common Pleas, Reeves H.E.L. iii 108. For the nature of the writ see below 93, 94 and App. XII.

[3] Hale, 2 P.C. 144. Stephen, H.C.L. i 242 n. 5; Coke, 2nd Instit. 55; Bl. Comm. iii 131, 132; Below 95.

[4] 4th Instit. 99, 101, 102.

records until a period somewhat later than that at which the court of Common Pleas attained a separate existence. It was not fixed like the court of Common Pleas in a certain place. It was the court held coram rege, and it followed the king. An act of Edward I.'s reign [1] ordered the Chancellor and the justices of the King's Bench to follow the court. Coke, it is true, thinks that notwithstanding the statute it was "a settled court during the several terms of the year," [2] and that the statute only meant that it was to follow the king when required to do so. This liability to attend the court ceased, he thinks, in Edward III.'s reign.[3]

The court had acquired a chief justice in Henry III.'s reign. Robert de Brus was in 1268 appointed "capitalis justitiarius ad placita coram rege tenenda." [4] But even when Bracton wrote the constitution and jurisdiction of the court is not very definite. The king, he says, has several courts "et illarum curiarum habet unam propriam, sicut aulam regiam, et justitiarios capitales, qui proprias causas regis terminant." It is the duty of these justices to correct the errors of all others.[5] Britton [6] and Fleta [7] describe it far more definitely. We can see in Fleta's description that the court has already acquired the two distinctive parts of its jurisdiction—the jurisdiction in error and the jurisdiction over criminal cases. In fact the court of King's Bench becomes a separate and a stationary court as it loses its former close connection (i) with the King himself and (ii) with the King's Council.

(i) We have seen that in Henry III.'s reign the court was held actually coram rege, so that when the king was a minor, who could not hold a court, the distinction between the court

[1] 28 Ed. I. St. 3, c. 5.

[2] 4th Instit. 72, 73. From Henry III.'s reign it usually sat in term time when the other courts sat. Ibid and Dugdale, Orig. Jurid. 38. See below n. 7.

[3] Till that reign the Justices following the king had their purveyance, 10 Co. Rep. 73 b. The writ sent to the J.J. of the King's Bench 1317 that, "By reason of any mandate under the great seal to them directed . . . they would in no case omit to do justice for the king and others suing before them neither denying nor delaying it to anyone," evidences the increasing separation of the court from the person of the king, Foss, Judges iii 199.

[4] Dugdale, Orig. Jurid. 38; Reeves, H.E.L. i 533.

[5] 105 b, 108 a. [6] i 3-7.

[7] II. 2, 5. "Habet etiam curiam suam et justitiarios suos tam milites quam clericos, locum suum tenentes in Anglia, *coram quibus et non alibi, nisi coram semetipso et concilio suo* vel Auditoribus specialibus, falsa judicia et errores Justiciorum revertuntur et corriguntur: ibidem etiam terminantur brevia de appellis et alia brevia super actionibus criminalibus et injuriarum contra pacem Regis illatorum impetrata et omnia in quibus continetur ubicunque tunc fuerimus in Anglia." Fleta seems to contemplate the fact that the court is not always following the king as the words in italics show. Cp. I. 48. 1. The three common law courts are there clearly contemplated.

held before the king's justices at Westminster and the king himself ceased to exist.[1] It is true that in a sense cases tried by the court of Common Pleas were tried before the king because they were tried in his court.[2] But in the King's Bench the king himself was always deemed to be actually present.[3] As early as Henry IV.'s reign, however, his presence had become a fiction. Even if actually present he could not pronounce judgment. "He doth judge by his judges"; "so as if any would render himself to the judgment of the king in such case where the king hath committed all his power judicial to others, such a render should be to no effect."[4] The once actual presence of the king explains the extensive jurisdiction of the court and survives only in its style.

This separation of the court of King's Bench from the person of the king was no doubt partly due to the fact that the king had another court—the court of the Steward and the Marshal—which took cognisance of cases which more nearly affected him. It is necessary to say something of this court because it was originally intimately connected with the court of King's Bench, and to this connection the court of King's Bench owed some part of the jurisdiction which it ultimately acquired.

The court of the Steward and the Marshal was the court which took cognisance of cases which arose within the verge, i.e. within a space of 12 miles round the court, or place where the king was actually residing.[5] At common law its jurisdiction fell under two heads: (1) The Steward and the Marshal had general jurisdiction within the verge as deputies of the Lord Chief Justice.[6] The prisoners of the King's Bench were in custodia Marschalli Marshallariæ Domini

[1] Above 74. [2] Above 34 n. 3.

[3] Pleas are held and parties are summoned "coram rege ubicunque tum fuerimus in Anglia." See P. and M. i 177, 178; Stephen, H.C.L. i 93.

[4] 4th Instit. 71; 2nd Instit. 186; Foss, Judges vi 1; 12 Co. Rep. 65 Coke told James I. that he could not give decisions in his court of King's Bench. "True it was that God had endowed his Majesty with excellent science and great endowments of nature, but his Majesty was not learned in the laws of his realm; and causes which concern the life or inheritance or goods or freedom of his subjects, they are not to be decided by natural reason, but by the artificial reason and judgment of law."

[5] For this court see Michelborn's Case 6 Co. Rep. 20. The Case of the Marshalsea 10 Co. Rep. 68 b; Britton i 3, 170-173; Fleta ii 3, 5, 61.

[6] Reeves, H.E.L. ii 297, 298, 604. Fleta II. 3. 4 calls the Steward the delegate of the Chief Justice. Britton (i 3) says the Steward holds pleas of the crown, "taking our place within the verge"; thus it is easy to see how the idea sprang up that the Steward is the deputy of the Chief Justice. In later days the court of King's Bench exercises a jurisdiction similar to that

Regis." Being only deputies of the Lord Chief Justice, when he was present, their general authority ceased. We have seen that by the act 28 Edward I. St. 3 c. 5 the King's Bench was ordered to follow the court. The result seems to have been that the general jurisdiction of the Steward and the Marshal practically ceased about this time; though they sometimes tried cases under a special commission of oyer and terminer issued in Vacation.[1] (2) As judges of the court of the Marshalsea they had a "very particular and limited jurisdiction." It was confined as to causes; they could only hear pleas of the crown and the three common pleas of debt, covenant, and trespass vi et armis. It was confined as to persons; in debt or covenant both parties must be of the king's household. In trespass it was enough if one party was of the king's household. It was confined as to place, being limited to the verge. Statutes of Edward I., Richard II. and Henry VI. enforced these limitations upon its authority.[2] Coke points out that all the acts passed concerning this court restrained or explained but never added to its jurisdiction. He decided in the *Case of the Marshalsea* that it could not try the newer forms of action such as assumpsit and trover.[3] Their once general jurisdiction had passed to the court of King's Bench, and the attitude of that court to the more limited court of the Marshalsea made the court of the Marshalsea almost useless. It was, as Blackstone points out, obliged to follow the king in his progresses, so that it was a court extremely inconvenient to use.[4] So uncertain was its jurisdiction and so inconvenient that Charles I. created a curia palatii, to be held before the Steward and Marshal, having jurisdiction over all personal actions arising within twelve miles of Whitehall. But Blackstone notes that if a case of any importance was begun in it, it was usually removed at once to the King's Bench or Common Pleas.[5]

This court is important in the history of the court of King's Bench for two reasons. (1) It is a step in the history of the separation of the court of King's Bench from the person of

possessed by this court. "We see the King's Bench by its presence suspend all courts within the same county; we find that it had marshals who travelled with it through the several counties; and that in a statute of Edward III. (5 Ed. III. c. 8) these marshals are coupled in a remarkable manner with marshals within the verge," Reeves, H.E.L. ii 604; Britton i 170-173.

[1] 10 Co. Rep. 71.

[2] 28 Edward I. St. 3 c. 3; 13 Richard II. St. 1 c. 3; 15 Henry VI. c. 1. 33 Henry VIII. c. 12 gives minute regulations for the trial and punishment of certain offences committed in the King's House.

[3] 10 Co. Rep. 71.

[4] Comm. iii 76; Reeves, H.E.L. ii 604.

[5] Comm. iii 76, 77.

the king. When the court of King's Bench became a separate court it exercised the extensive criminal and civil jurisdiction with which its once intimate connection with the person of the king gave to it.[1] (2) It is probable that the fictions by which the court of King's Bench ultimately acquired a concurrent jurisdiction with the court of Common Pleas sprang from its early connection with the Steward and the Marshal's court. The Marshal, we have seen, kept the prison of the court of King's Bench. We shall see that the foundation of the jurisdiction over Common Pleas was based upon the fact or the fiction that the defendant was in the custody of the Marshal.[2]

(ii) The connection of the court of King's Bench with the Council lasted till nearly the end of the 14th century. Parties are summoned habitually to appear not simply "coram rege," but "coram rege et consilio."[3] The Council did not consist merely of officials. In 1315 a case concerning a fine levied of lands was brought by writ of error from the Common Pleas to the King's Bench. The Despencers were concerned. Not only the ordinary judges of the court, but also the judges of the Common Pleas, the barons of the Exchequer, the Chancellor, the Treasurer, "and other magnates of the king's council" took part in the judgment.[4] In fact "the proceedings of the courts below, in all their stages, were within the cognisance of the Council."[5] The case of Boddenho illustrates this fact. That case was decided by the court of Common Pleas, after frequent interferences by the council; and after all a writ of error was brought in the King's Bench.[6] The case of the Stantons shows that the proceedings of both the court of Common Pleas and of the King's Bench were liable to be interfered with not only by the Council, but also by Parliament.[7] Hale points out that the cases in which this close connection between the King's Bench and the Council is

[1] Above 80 n. 6.

[2] Reeves, H.E.L. ii 604. "When we find a proceeding in this court per inventionem plegiorum (Fleta II. 3. 1); when a person merely because he was supposed to be in custodia mareschalli, might be proceeded against for debts and contracts; where can we look for the origin of such innovations, but to the model preserved in the ancient history of the steward's court?" For the way in which the King's Bench used and extended "this borrowed piece of judicature," see below 87-89.

[3] Bracton's Note Book case 1189; ibid vol. i 57-59. Hale, Jurisdiction of the House of Lords, c. vii, says, "The consilium regis in ancient times did so often sit in the court of King's Bench, and were so often mingled in and with that court and the transactions thereof, that the style of that court many times was "placita coram consilio regis," and sometimes "coram rege et consilio."

[4] Pike, History of the House of Lords 44, 45.

[5] Y.B. 12, 13 Ed. III. (R.S.) xciv. [6] Ibid xciv-c. (1336-1341).

[7] Y.B. 13, 14 Ed. III. (R.S.) xxxvi-xlii. (1340-1345).

apparent, can be referred to three categories. It appears (1) in difficult cases by way of advice and direction, (2) where issue has been joined before the Council, and the records are sent into the King's Bench and judgment thereon is given by that court, and (3) in important cases in which the Council sat with the court of King's Bench.[1] Mr Pike says that no separate records of the proceedings of the Council earlier than 1386 are known to exist. Before that date the King's Bench rolls are often used to record the proceedings of the Council. The inference would seem to be that the King's Bench did not get clear from all association with the Council much before that date.[2]

The jurisdiction of the court of King's Bench was general and universal. The judges of the court "are called *capitales* in respect of their supreme jurisdiction, and *generales* in respect of their general jurisdiction throughout England."[3] Coke sums up the jurisdiction of the court under several heads.[4] (1) It holds cognisance of all pleas of the crown; (2) It has jurisdiction "to examine and correct all and all manner of errors in fact and in law of all the judges and justices of the realm in their judgments, process, and proceedings in courts of record, and not only in pleas of the crown, but in all pleas, real, personal, and mixt, the court of Exchequer excepted as hereafter shall appear." (3) "This court hath not only jurisdiction to correct errors in judicial proceedings, but other errors and misdemeanours extra-judicial tending to the breach of the peace, or oppression of the subject . . . or any other manner of misgovernment." (4) It has jurisdiction over all trespasses done vi et armis. (5) "This court hath power to hold plea by Bill for debt, detinue, covenant, promise, and all other personal actions . . . against any that is in custodia Mareschalli or any officer, minister or clerk of the court." (6) The judges of this court are the sovereign justices of oyer and terminer, gaol delivery, coroners and conservators of the peace in the realm. The authority of justices in eyre, of oyer and terminer, and gaol delivery cease when the King's Bench comes into the county.

From this summary of Coke it will be clear that the jurisdiction of the court comprises—1. criminal cases; 2. civil cases; and 3. superintendence over the due observance of the law by officials and others.

1. Criminal jurisdiction.

[1] Jurisdiction of the House of Lords c. vii.
[2] History of the House of Lords 46.
[3] Bracton f. 108; Coke, 4th Instit. 75.
[4] 4th Instit. 71-73.

This comprises (*a*) ordinary jurisdiction, (*b*) transferred jurisdiction, (*c*) proceedings in error.

(*a*) Ordinary jurisdiction.

It was not common even in John and Henry III.'s reigns to try ordinary criminal cases before the court of King's Bench.[1] Such cases only came before it if they were transferred, unless the court happened to be taking all the crown business for the county in which it was sitting. Probably it was at no period very common for ordinary criminal cases to be tried before it.[2] But till 1872 the grand jury of Middlesex was regularly summoned whether or no there were any indictments to be preferred before them. 35, 36 Vict. c. 52 enacts that they need not be summoned unless there is an indictment to be preferred. Such indictments are preferred only in cases of public importance.[3]

(*b*) Transferred jurisdiction.

Indictments and other proceedings from inferior courts may be removed into the court of King's Bench by writ of certiorari.[4] This will be done when a fair trial cannot be had before such inferior court, or where some difficult question of law is likely to arise. In the 15th and 16th centuries the number of criminal cases of all kinds so transferred was considerable.[5] Such trials when held in term time are called trials *at bar*, i.e., they are held at the bar of the court before the judges of the court sitting *in banc.* But the court has power, instead of trying such cases itself, to send such cases for trial into the counties where the crimes were committed, or to order those cases to be heard by the itinerant justices sitting at nisi prius.[6]

(*c*) Proceedings in error.

It is a peculiarity of our system of criminal jurisdiction that there is practically no provision made for an appeal either from the finding of the jury on a question of fact,[7] or

[1] Select Pleas of the Crown (S.S.) xxiii. The court might hear all offences committed in Middlesex, or any other county in which the court was sitting. In later times misdemeanours committed in any county might be so tried on information filed by the Attorney-General, Reeves, H.E.L. iii 158.

[2] Stephen, H.C.L. i 95, 96, says, "It is a curious question, though perhaps the solution would not be worth the trouble necessary to arrive at it, how far, at different periods of its history, the court of King's Bench was in practice as well as in theory a court for the trial of common criminal cases."

[3] Ordinary cases are tried either at the Central Criminal Court or at the Quarter Sessions, below 123, 128.

[4] Below 93; App. XIII.

[5] Stephen, H.C.L. i 96. At the present day they are "almost always misdemeanours partaking more or less of the character of private wrongs as indictments for libel, conspiracy to defraud, or the like" (ibid).

[6] Coke, 4th Instit. 73, 74; below 117, 120.

[7] For the process of attaint see below 161-163.

from the ruling of the judge on a question of law. At different periods in the history of our law this anomaly has been modified in the following different ways.

(1) The writ of error.[1] This proceeding lies only for errors on the record. Until 1705 the grant of a writ of error was a matter entirely within the discretion of the crown. The crown for any reason, or for no reason, might order the Attorney-General to grant his fiat for the issue of such a writ. The writ being issued the court was satisfied with the Attorney-General's confession of error. In 1705 the judges thought that the writ of error should always be issued in cases of misdemeanours where the error was probable; and that if the court could see that there was such probable error they might order the Attorney-General to grant his fiat. But, the issue of the writ becoming thus a matter of right, they laid it down that there must really be an error. The mere admission of the Attorney-General did not suffice. The old practice however continued in cases of treason and felony. But the Attorney-General would never now refuse his fiat if there was a probable error alleged; and the question whether or no there is error is judicially determined. The writ of error is however little used because the proceeding is cumbersome, and, to a large extent, useless. The formal history of the case is stated at large on the record—the arraignment, the plea, the issue, and the verdict. But the record takes no account of some of the most material parts of the trial, when error is most likely to occur—the evidence and the direction of the judge to the jury.[2] It is only errors on the record which can be assigned.

(2) Motions for a new trial.[3] We must distinguish between trials which have resulted in an acquittal and those which have resulted in a conviction. It was settled in the 17th century that after an acquittal there can be no new trial,[4] after some doubts whether such new trial might not be had if the case was not capital.[5] In *Reg. v. Duncan*[6] in 1881 Lord

[1] Wilkes's case (1770) 4 Burr. 2550; Stephen, H.C.L. i 309, 310.

[2] Stephen, H.C.L. i 309, "In Orton's trial the question was whether cumulative punishment could be given for two offences charged in different counts of the same indictment. The record was a parchment roll of monstrous size, setting forth, together with much other wholly unimportant matter, every order made by the court for the adjournment of the trial to the next sitting." The writs of error in R. v. Bradlaugh (1878) and R. v. Orton (1881) are the only ones in which for some time recourse has been had to this writ. For an explanation of this see below 156.

[3] On the whole subject see Thayer, Evidence 175-179.

[4] 1 Lev. 9 (1660); Rex v. Bowden 1 Keb. 124 (1661); Rex v. Fenwicke and Holt 1 Keb. 546 (1663); Rex v. Jones 8 Mod. 201, 208 (1724).

[5] 1 Lev. 9, per Wyndham, J.

[6] L.R. 7 Q.B.D. 198.

Coleridge, C.J., said, "The practice of the courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment, no new trial will be granted, if the prisoner or defendant, having stood in that danger, has been acquitted." If the trial results in a conviction the rule in 1671 was in accordance with previous cases,[1] held to be the same;[2] but the court was equally divided. In 1673,[3] a new trial was granted after a conviction for perjury. This precedent was followed; and the rule was settled that in cases of misdemeanour a new trial may be granted on the ground of misreception of evidence, misdirection of the judge, or because the verdict is against the weight of evidence.[4] There is only one precedent for the grant of a new trial in cases of felony.[5] This has not been followed by the Privy Council,[6] and has been disapproved by the Queen's Bench division.[7]

(3) The jury may find a special verdict, i.e., they find the facts and leave it for the court to say whether, on those facts, the prisoner is guilty or not.[8]

(4) It was an old practice for the judge, in case of a conviction, if he felt a doubt as to the law, to respite judgment or sentence, and discuss the matter informally with the other judges. If they thought that the prisoner should be acquitted he was acquitted, or, if judgment had already been passed, he was pardoned.[9] Statutory authority was given to this practice in 1848 by the establishment of the court of Crown Cases Reserved.[10] All the judges are members of this court. Five, of whom the Lord Chief Justice must be one, form a quorum. If the five differ, any one may require the matter to be referred to all the judges. Any judge or chairman of Quarter Sessions may reserve a point for discussion by this court, where a prisoner has been convicted. The question whether or no he will reserve the point is within his absolute discretion. The court can only determine questions of law arising at the trial.

The result is that there is no possibility of questioning the ruling of the judge on a point of law except with his leave;

[1] E.g. Rex v. Lewin 2 Keb. 396 (1668).
[2] Rex v. Hannis 2 Keb. 765 (1671).
[3] Rex v. Lathan and Collins 3 Keb. 143, cp. Rex v. Cornelius 3 Keb. 525.
[4] Stephen, H.C.L. i 310, 311. [5] Rex v. Scaife 17 Q.B. 238 (1851).
[6] Reg v. Bertrand L.R. 1 P.C. 520 (1867), cp. Reg v. Eduljee Bryamjee 5 Moo. P.C.C. 276 (1846).
[7] Rex v. Duncan L.R. 7 Q.B.D. (1881) 198, 201.
[8] 13 Ed. I. St. 1 c. 30; Coke, 2nd Instit. 425.
[9] Stephen, H.C.L. i 311. [10] 11, 12 Vict. c. 78.

and, except by motion for a new trial (which is only granted in the case of misdemeanours), there is practically no way of questioning the verdict of the jury on the facts. All that can be done, if new facts come to light, is to pardon the man on the ground of his innocence.[1]

2. Civil jurisdiction.

This falls under two heads—(*a*) Original jurisdiction, (*b*) Jurisdiction in error.

(*a*) Original jurisdiction.

The court of King's Bench had no general jurisdiction over ordinary civil suits between subject and subject. They fell under the jurisdiction of the court of Common Pleas. The court of King's Bench managed however to attain this jurisdiction by means of a fiction.

The court of King's Bench, like the other Common Law Courts, could proceed by Bill against certain officials of the court, or against any persons accused of contempts, deceits, or trespasses. Hale cites many such precedents from Edward III.'s reign.[2] But this process was not available for actions of debt, detinue, account or covenant. A better method was needed. It was found in the fact or the fiction of the custody of the Marshal. The court of King's Bench had, as we have seen, absorbed the greater part of the ancient jurisdiction of the Steward and the Marshal. Actual custody by the Marshal sufficed to give to the King's Bench a general jurisdiction similar to that described by Fleta as belonging to the Marshal and under similar forms. In one case in Henry VI.'s reign it was held that actual custody was necessary to found the jurisdiction, so that it could not be exercised against a person who was released on bail. This decision was reversed later in the reign; and it was ultimately held that the mere record on the rolls of court that the defendant had given bail would be sufficient evidence of actual custody.[3] To get this evidence on record what was called a Bill of Middlesex,[4] was filed against the defendant by the plaintiff, stating that he was guilty of trespass vi et armis—an offence falling properly within the jurisdiction of the court. The plaintiff gave pledges for the prosecution,

[1] Stephen, H.C.L. i 313-318.

[2] Discourse concerning the courts of King's Bench at Common Pleas, Hargrave's Law Tracts i 359, 363, 364.

[3] Reeves, H.E.L. ii 602, 603; iii 752, 753. On the whole subject see Bl. Comm. iii 284-288. For forms see App. XX.

[4] So called because the court sits in that county. If it sat in Kent it would be a bill of Kent, Bl. Comm. iii 285.

which pledges, even in Coke's day, were the fictitious John Doe and Richard Roe.[1] The sheriff of Middlesex was then directed to produce the defendant before the court to answer the plaintiff concerning this plea of trespass. If the sheriff returned to the Bill "non est inventus," a writ of Latitat was issued to the sheriff of an adjoining county. The writ recites the Bill of Middlesex and the proceedings thereon, states that the defendent "latitat et discurrit" in the county, and orders the sheriff to catch him. The trespass and the proceedings thereon were fictions invented to give the court jurisdiction. Thus when the defendant did not live in Middlesex it was clearly a waste of time to start with a real Bill of Middlesex. Such a bill was supposed, and the Latitat was really the first step taken in the action.[2] A real Bill was only needed if the defendant actually lived in Middlesex. But the Bill actual or supposed was the foundation of the subsequent proceedings against the defendant.

If the defendant appeared and gave sureties for his future appearance he was sufficiently in the custody of the Marshal to give jurisdiction to the court. If he did not appear to the Bill or the Latitat he was liable to be arrested for contempt of court in not appearing. But as all the proceedings were fictitious, the contempt would seem to share the fictitious character. To arrest a man for a merely fictitious contempt was clearly a hardship.[3] Therefore, in the event of non-appearance, the plaintiff was allowed to enter an appearance for him, and to give as sureties for his appearance his friends John Doe and Richard Roe. This was called giving "common bail."[4] In some cases, however, it was desirable that the defendant should put in substantial bail for his appearance. This was called "special bail." The question when special bail could be required was a question depending upon the practice of the court. It was usually required if the plaintiff swore that the cause of action was worth £10 or upwards. 13 Charles II. St. 2 c. 2 enacted that unless

[1] 4th Instit. 72, "And it is observable, that then putting in bail at one man's suit, he was in custodia Mareschalli to answer all others which would sue him by bill, and this continueth to this day. If any person be in custodia Mareschalli, etc., be it by commitment, or by Latitat, Bill of Middlesex or other process of law, it is sufficient to give the court jurisdiction; and the rather for that the Court of Common Pleas is not able to dispatch all the subjects causes, if the said actions should be confined only to that court." [2] Reeves, H.E.L. iii 755 n. a.

[3] Many statutes were passed to free defendants sued by this process from this liability to arrest, 12 Geo. I. c. 29; 5 Geo. II. c. 27; 21 Geo. II. c. 3; 43 Geo. III. c. 46; 7, 8 Geo. IV. c. 71. [4] Coke, 4th Instit. 72; Bl. Comm. iii 287.

the true cause of action was set forth in the writ or other process, no special bail could be required, and no person could be arrested by such process. It is clear that the process by way of Bill of Middlesex and Latitat did not set forth the true cause of action. It was founded on a fictitious trespass, which was a mere cover for the real cause of action. "This statute," says Blackstone[1] "(without any such intention in the makers), had like to have ousted the king's bench of all its jurisdiction over civil injuries without force." The difficulty was surmounted by adding to the Bill complaining of the trespass what was known as the "ac etiam" clause, stating the true cause of action. This expedient was invented a few years after the statute was passed. The supposed trespass gave jurisdiction to the court. The real cause of complaint, contained in the "ac etiam" clause, authorised the arrest in default of special bail.[2]

The Uniformity of Process Act[3] abolished the necessity for these fictions, and provided that all actions should be begun by a writ in the form prescribed in the Act, and that all subsequent process should be according to the rules and the forms therein also prescribed.

(*b*) Jurisdiction in error.

Early law provided several methods by which erroneous judgments might be remedied by the court which gave them. A short account will be given of these before we explain the remedies which the parties might have in a higher court—jurisdiction in error in the proper sense of the term.

(1) The writ of *Audita Querela*. This writ lies "where a defendant against whom judgment is recovered . . . may be relieved upon good matter of discharge which has happened since the judgment."[4] It may be directed either to the Common Pleas or to the King's Bench, and, after stating that the complainant has been heard, it directs the court to hear both parties and to do justice to them. Blackstone says[5] that it is in the nature of a bill in equity, for it relieves against "oppressive defect of justice,

[1] Comm. iii 287, 288.

[2] The C.P. used the writ Quare Clausum Fregit as the K.B. used the Bill of Middlesex, with the addition of a "nec non" clause to correspond with the "ac etiam" clause. This clause was the invention of Ld. North when Chief Justice of the C.P., Lives of the Norths i 128-132. But the K.B. still continued to offer somewhat superior procedure advantages, Hale, Concerning the K.B. and C.P., Harg. Law Tracts i 367-370.

[3] 2 Will. IV. c. 39.

[4] F.N.B. 233; Bl. Comm. iii 404.

[5] Comm. iii 404, 405.

where a party has a good defence, but by the ordinary forms of law had no opportunity to make it." Similar relief could in many cases be obtained at the end of the 17th century by motion to the court.[1] In Blackstone's time this writ had gone out of use.[2]

(2) Motion for a new trial.[3] From an early date the king's courts (Common Pleas or King's Bench) were accustomed to suspend judgment, and, if sufficient cause were shown, to grant a new trial.[4] These new trials were probably at first granted on account of some misbehaviour or irregularity in the proceedings of the jury. We can see from a case in 1648[5] that the court regarded itself as possessing the right to grant a new trial as part of its usual powers. Rolle, J., though he refused to stay judgment, advised a new trial. In 1655 Glyn, C.J., in granting a new trial on account of excessive damages stated that "it is frequent in our books for the court to take notice of miscarriages of jurors, and to grant new trials upon them."[6] During the early part of the 17th century the court of Common Pleas was accustomed to grant new trials upon the certificate of the judge that the verdict was contrary to his opinion. The court of King's Bench required some matter appearing on the record to justify such a grant.[7] But in Charles II.'s reign they adopted the practice of granting a new trial on the affidavit of the party. This was necessary, partly because parties would otherwise have appealed to equity to be relieved from judgments founded upon unreasonable verdicts; and partly because, after the fall of the court of Star Chamber, there was no other check upon juries.[8] As Lord Mansfield said, "It is absolutely necessary to justice that there should upon many occasions be opportunities of reconsidering the cause by a new trial."[9] If it appears

[1] Wicket v. Cremer 1 Ld. Raym. 439 (1699).
[2] Comm. iii 405.
[3] Thayer, Evidence 170-174.
[4] Holt, C.J., in Argent v. Darrell Salk. 648 (1699) considered the jurisdiction old "as appears from this, that it is a good challenge to the juror that he hath been a juror before in the same cause." He does not cite his authority. In Herbert v. Shaw 11 Mod. 118 (1707) the same judge cited a case of Edward III.'s reign where a new trial was granted because a great lord interested in the case sat on the Bench. Lord Mansfield in Bright v. Eynon 1 Burr. 390 (1757) accounts for the absence of authority by saying "that the old report books do not give any accounts of determinations made by the court upon motions." Whatever the antiquity of the practice it was much extended in the 18th century.
[5] Slade's case, Style 138.
[6] Wood v. Gunston, Style 466.
[7] Bl. Comm. iii 388; Martyn v. Jackson 3 Keb. 398 (1674).
[8] Bl. Comm. iii 388; Thayer, Evidence 172 n. 4.
[9] Bright v. Eynon 1 Burr. 390, 393 (1757).

necessary they will be granted after a trial at bar as well as after a trial at nisi prius.

(3) Certain errors in the process of the court (e.g. by default of the clerks) or as to findings of fact by the court could be remedied by the court itself. The writ to effect this is called the writ of error "coram vobis" when the case is in the Common Pleas; "coram nobis" when it is in the King's Bench.[1]

Jurisdiction in error, properly so-called, belonged almost exclusively to the court of King's Bench. That court could, by writ of error, try errors in law committed by all inferior courts of record, by the Common Pleas, and by the King's Bench in Ireland.

We have seen what is the nature of a writ of error.[2] It lay for errors on the record. If any error, however slight, appeared, the court must award a new trial.

The judge made up the record; and in the 13th century they were suspected of occasionally making fraudulent alterations of the records. In 1289 Edward I. severely punished the judges who were found guilty of these and similar malpractices.[3] His severity made the judges reluctant to amend even the most trifling and obvious errors. Writs of error were brought, and judgments given upon the merits were reversed, for merely verbal errors on the record. "Justice was perpetually entangled in a net of mere technical jargon." Several statutes were passed to remedy this state of things, and to ensure that writs of error should only be brought for a material mistake.[4]

The writ of error lay only for errors on the record. It might happen that the parties alleged matters upon which the judge pronounced a decision without recording such decision. The result was that rulings of this sort, though both material and erroneous, could not be assigned as errors. To remedy this the Statute of Westminster II.[5] provided that if

[1] Saunders ii Pt. i 101, 101 a. The difference in form results from the theory of the actual presence of the king in the court of King's Bench.

[2] Above 77, 78; App. X.

[3] Bl. Comm. iii 408-410. Hengham was said to have been fined 800 marks for altering a fine set upon a poor man from 13s. 4d. to 6s. 8d. There was a tradition in Elizabeth's reign that the money had been employed to build a clock house at Westminster, Coke, 4th Instit. 255; Foss, Judges iii 40, 41.

[4] These were called the statutes of Jeofails, because if a pleader saw and acknowledged his error (Jeo faile) he was allowed to amend. For instances cf. Y.B. 13, 14 Ed. I. (R.S.) lxxv, lxxvi.

[5] 13 Edward I. Stat. 1 c 31. Coke (2nd Instit. 426, 427) says, "The mischief before this statute was that when the plaintiff or the defendant did offer to allege an exception (as in those days they did ore tenus at the bar) praying the justices to allow it, and the justices overruling it so as it was never entered of

a defendant alleged an exception which the judge refused to allow, he might write it down and require the judge to seal it. The ruling upon such an exception could then be assigned as an error even though it was not found upon the record. This writing was called a Bill of Exceptions. The statute was construed to apply to the case of wrongfully allowing, as well as wrongfully disallowing an exception, i.e. both the plaintiff and the defendant could take advantage of it. It did not apply to cases to which the crown was a party, and therefore it did not apply to the Revenue side of the Court of Exchequer.[1]

Motions for a new trial, a writ of error on the record, or a Bill of Exceptions were therefore the available methods of questioning a decision of the court. But they could not all be used at once. If a new trial were applied for, the party waived his right to a writ of error on the record, or a Bill of Exceptions upon the first trial. The result was that if the application for a new trial failed, the party lost all right of appeal. If it succeeded he might proceed by way of writ of error on the record, or on a Bill of Exceptions in case he thought there had been any misdirection of the judge on such new trial.[2] We shall see that the Common Law Procedure Acts made considerable alterations of these rules.[3]

3. Superintendence over the due observance of the law by officials and others.

By means of certain writs known as "prerogative writs" the court of King's Bench had jurisdiction to amend "other errors and misdemeanours extra-judicial." This jurisdiction is no doubt due to the peculiarly intimate connection of the court with the person and the prerogative of the crown. We shall see that up to Charles I.'s reign these duties and powers were shared by the Council.[4] When, in 1640, the jurisdiction of the council in England came to an end, this branch of the jurisdiction of the Court received a considerable extension.

All the prerogative writs and the writ of error have this common characteristic that they can issue to all parts of the

record, this the party could not assign for error." Reeves, H.E.L. ii 97-100. Ld. Campbell tells us of a learned Serjeant of his acquaintance "who never went into court without several blank bills of exceptions in his bag, or rather cartouche box, to be filled up and fired off at the Chief Justice in the course of the morning," Lives of the Chief Justices ii 396.

[1] Attorney-General v. Sillem (1863), 2 H. and C. at p. 605.

[2] Atty.-General v. Sillem (1864), 10 H.L.C. at pp. 730, 731, 734.

[3] Below 413, 414.

[4] Below 279-281.

king's dominions (with the exception of Scotland) if the court sees fit to issue them.[1] In this they differ from the ordinary writs provided for beginning actions between private persons.[2] The only exception to this rule is made by 25, 26 Vict. c. 20 which enacts that the writ of Habeas Corpus shall not issue out of England into any colony or foreign dominion of the crown where there is a court established having authority to issue the writ.[3]

The following are the writs by which the court acted :—

*Certiorari.*[4] This is an original writ which can be issued either out of the Chancery or the King's Bench when the king desires to be certified of any record before any court of record, or before certain officials, e.g. the sheriff or the coroners. Thus, as we have seen, indictments may be removed from the itinerant justices by this writ to the King's Bench.[5] It is demandable in criminal cases as of right only by the crown.

*Prohibition.*[6] "A prohibition is a writ issuing properly only out of the court of King's Bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of Chancery, Common Pleas, or Exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction."[7] Fitzherbert[8] gives many instances of such writs. Thus a prohibition may be

[1] Rex v. Cowle (1759) 2 Burr. 855, 856. As to the writ of error see Dutton v. Howell (1693), Shower P.C. 33; and Vaughan 401, 402. Vaughan says that this is "the only writ which concerns right and property between the subjects that lies [outside England]. The reasons are, first, that without such writ the law appointed or permitted to such inferior dominion might be insensibly changed within itself, without the assent of the dominion superior. Secondly, judgments might be given to the discredit or lessening of the superiority . . . or to make the superiority be only of the King (as King James would have it in the case of Ireland, ex relatione J. Selden mihi, whom King James consulted on the question)." As Hale says, it is only when the country is governed by the common law that the writ can run. It could not for this reason run in the Channel Islands, Comm. Law 269.

[2] Calvin's Case 7 Co. Rep. 20 a; Craw v. Ramsay (1670), Vaughan 290. Unless the suit is "immediately for the King." As he can sue in any court the necessary writs can issue to any part of his dominions, Hale, Comm. Law 268.

[3] Forsyth, Leading Cases 452.

[4] App. XIII. Holt, C.J. (1 Salk. 263), said that when a new jurisdiction is created by Parliament to act according to the course of the common law a writ of error can be brought from its decision. When they are to act in a summary way, or in a new course different from the common law, a writ of certiorari lies.

[5] Above 84. [6] App. XII, A. [7] Bl. Comm. iii 112.

[8] F.N.B. 93-108. In some cases it was granted when wrong was done to the party by proceeding in the other jurisdiction, e.g. the case of a lease offered to be proved in the ecclesiastical court by one witness and refused, because by that law two witnesses were required, Home v. Earl Camden (1795) 2 Hy. Bl. at p. 536.

directed to the sheriff that he do not hold plea in a writ of right, because the tenant has put himself upon the Grand Assize; or a prohibition may be directed to the ecclesiastical court if it holds plea of lay fee. We shall see that it was by means of this writ that the Courts of Common Law asserted their superiority over the court of Admiralty and the Ecclesiastical Courts.[1] The Ecclesiastical Courts tried in vain to restrict its issue at different periods.[2] They succeeded however in establishing their right to an appeal in case of the issue of the writ. A statute was made in 1296 which provided that when a prohibition has been directed to the ecclesiastical judges, the chancellor or chief justice shall, if they think that the matter should be determined in the Ecclesiastical Court, order that court to proceed notwithstanding the prohibition. This process of appeal was known as the grant of a writ of Consultation.[3] In no other cases was there any appeal directly provided by law against the issue of the writ.[4]

*Mandamus.*[5] This is "a command issuing in the king's name from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some particular thing therein specified, which appertains to their office and duty."[6] It lies, for instance, to compel the admission or restoration of any person to a public office, or to compel the holding of a court. As Lord Mansfield put it, "When there is no specific remedy the court will grant a mandamus that justice may be done."[7] But if there is a more convenient remedy it will not be granted.[8]

*Quo Warranto.*[9] This is a writ "In the nature of a writ of

[1] Below 321-326, 365.

[2] 51 Henry III.; Articuli Cleri 9 Edward II.; Articles exhibited by Bancroft, Archbishop of Canterbury 2 James I; Coke, 2nd Instit. 599-618.

[3] 24 Ed. I.; App. XII, B.

[4] 1 Ld. Raym. 545; 5 B. and C. 765. The same result was got in another way. Eyre, C.B., in Home v. Earl Camden (2 Hy. Bl. 533) giving his opinion to the House of Lords said, "In modern times when prohibitions are applied for . . . and the parties applying suggest grounds either of fact or law . . . which appear to the court so doubtful as to be fit to be put in a course of trial, the party applying is directed to declare in prohibition, that is to institute a feigned action . . . in which action, in the shape of a question whether such a prohibition ought *to have been* granted, the real question, whether such a prohibition ought *to be* granted is considered." This question could be taken to the House of Lords, as in form it was an action for damages for proceeding after a prohibition had been obtained.

[5] App. XV.

[6] Bl. Comm. iii 110. There was a similar writ of procedendo ad judicium issuing out of the Chancery and ordering the judges of any court to proceed to judgment. Ibid 109. F.N.B. 359.

[7] R. v. Bank of England (1780) 2 Dougl. 506.

[8] Re Nathan (1884) L.R. 12 Q.B.D. 461.

[9] App. XIV.

right for the king against persons who claimed or usurped any office, franchise, liberty, or privilege belonging to the crown, to inquire by what authority they maintained their claim, in order to have the right determined."[1] We have already seen what an important part the writ played in Edward I.'s reign.[2] It gradually went out of use; and its place was taken by an information in the nature of a Quo Warranto filed by the Attorney-General.[3] The most famous instance of this proceeding was the information filed against the corporation of London 1681-1683.[4]

*Habeas Corpus.*[5] This writ has a great place in the history of our Constitutional law, because it has come to be the writ by means of which the liberty of the subject is protected.

At all periods in the history of our law such liberty has been asserted and protected. The famous clause of the Great Charter laid down the principle "Nullus liber homo aliquo modo destruatur, nisi per legale judicium parium aut per legem terræ";[6] and though that clause has been construed in another way than that intended by its framers, it is, because it has been so construed, the foundation of the numerous statutes which assert the principle that no man can be imprisoned except upon some grounds known to the law.[7] To guard this principle early law provided several writs. It is not till the end of the 16th century that the writ of Habeas Corpus is generally used for this purpose. We shall deal shortly with these before discussing the writ of Habeas Corpus.

The writ *De Homine Replegiando.*[8] This was a writ directed to the sheriff ordering him to "replevy" a man in prison, or in the custody of some person named in the writ. If the sheriff returned that the prisoner had been "eloigned," i.e. carried away, to a place where he could not be found, he was directed to take in "withernam" i.e. by way of reprisal,

[1] Selwyn Nisi Prius (Ed. 1842) 1143.

[2] Above 48, 49.

[3] The process upon this was different; and it was not, as the writ itself was, conclusive for the future against the crown as well as the subject, King v. Trinity House (1662) Sid. 86; 12 Mod. 225.

[4] 8 S.T. 1039. The offences alleged were the making of byelaws for levying money for permission to use public markets in the city; and for saying in a petition to the king, which was caused to be printed, that the prorogation of Parliament in 1680 was an interruption of justice.

[5] App. XVI.

[6] § 39.

[7] 5 Edward III. c. 9; 25 Edward III. St. 5 c. 4; 28 Edward III. c. 3; 16 Car. I. c. 10.

[8] F.N.B. 152; Hale, 2 P.C. 141; Bl. Comm. iii 129; Stephen, H.C.L. i 240. For instances of the issue of the writ see 8 S.T. 1347 and 9 S.T. 184. It might also be issued by the C.P. per Vaughan, C.J., Bushell's case (Vaughan 157).

the person holding the prisoner in custody, till he produced the prisoner.. It is a process similar to that by which chattels taken in distress can be replevied.

The writ of *Mainprize*.[1] This writ lies "Where a man is taken for suspicion of felony, or indicted of felony, for the which thing by the law he is bailable, and he offereth sufficient sureties unto the sheriff or others who have authority to bail him, and he or they do refuse to let him to bail."

The chief use of these two writs was to compel the sheriff or other gaoler to release on bail or mainprize.[2] As a general rule he would be ready to do so. "The mediæval dungeon was not all that romance would make it; there were many ways out of it. The mainprize of substantial men was about as good a security as a gaol."[3] In fact the question what prisoners were bailable was left largely to the discretion of the sheriff. Homicide, breaches of the forest law, imprisonment by the special command of the king, were the chief cases in which in Glanvil's time bail must be refused. In Bracton's time high treason and crimes punishable by death or mutilation were added to the list.[4] In 1275 the foundation of the subsequent law as to what offences were bailable was laid by the statute of Westminster I.[5] These writs were of little use, however, as against the crown.[6] The procedure upon them was cumbersome. They gradually, therefore, go out of use.[7]

The writ *De Odio et Atia*. "It was," says Coke, "a means by the common law before indictment or appeal to protect the innocent against false accusation, and to deliver him out of prison."[8] If a man were appealed of homicide,[9] and imprisoned, he might allege that the appeal was brought "de odio et atia," i.e. from hatred and malice. He can then get a writ to try the issue so raised. If the jury find in his favour the appeal is quashed and he will be released—though he is still liable to be indicted at the suit of the crown. The writ was so popular at the time of Magna Carta that it was

[1] F.N.B. 563.

[2] The difference between the two seems to have been that the prisoner is actually in the custody of the person who has given bail for him; while if mainprize has been given he is not in custody at all, the manucaptors being sureties only for his appearance, P. and M. ii 587, 588; Hale, 2 P.C. 124, 125; Stephen, H.C.L. i 240, 241; Coke, 4th Instit. 178-180. Thus the justices of gaol delivery might try a prisoner out on bail because he is in contemplation of law in the gaol; they could not try a prisoner in the custody of mainpernors, Hale, 2 P.C. 35.

[3] P. and M. ii 582. [4] Ibid 582, 583. [5] 3 Edward I. c. 15.

[6] Coke, 2nd Instit. 187. [7] Bl. Comm. iii 129.

[8] 2nd Instit. 42. See P. and M. ii 585-587.

[9] An offence for which he could not be released by either of the two first named writs.

provided that nothing should be paid for it.[1] It comes, however, to be simply a means by which a person charged with homicide may get provisionally released on bail. The cumbrous nature of the procedure upon the writ,[2] and the increasing frequency of gaol deliveries, caused it to become gradually obsolete.

The writ of Habeas Corpus is the writ which ultimately superseded the three last-mentioned writs.

In Edward I.'s reign the writ was in existence; but it belonged to the law of procedure. Its issue was one of the steps which might be taken to secure the appearance of the defendant.[3] Some forms of the writ have in fact never ceased to be used as parts of the law of procedure.[4] But it is clear that a process by which a court can secure the presence of a person before itself can be turned to many different uses. In the 15th century it was used by the Courts of Common Law when persons actually sued, or privileged only to be sued before them, were imprisoned by the process of an inferior court.[5] Its issue for this purpose was sometimes abused. The statute of 2 Henry V. St. 1 c. 2 recites that defendants committed to prison by the City of London Court, and by the courts of other cities and boroughs, till they have made agreement with the plaintiffs, get their release by this writ. At the end of the 15th century it was used in a similar manner against the growing equitable jurisdiction of the Chancellor.[6] Persons committed by the Chancellor for disobedience to his orders were often considered by the Common Law Courts to have been wrongfully imprisoned. The extension of the writ to their case must have seemed but a slight extension. When, in the 16th century, the Common Law Courts entered

[1] § 36; 2nd Instit. 42. Stephen, H.C.L. i 242, following Foster, thought that the writ was abolished by the Stat. of Gloucester (1278) c. 9. But the writ is mentioned 1285 Stat. West. II. c. 29. Coke thought (2nd Instit. 42) that it was abolished by 28 Ed. III. c. 9 and restored by 42 Ed. III. c. 1. Both Coke and Hale (2 P.C. 148) considered it to exist when they wrote. See P. and M. ii 587 n. 2. Whether 28 Ed. III. c. 9 can have the effect attributed to it by Coke does not appear quite clear from the words of the statute.

[2] Hale, 2 P.C. 148. He says (1) There must be a writ to inquire de vita et membris, (2) an inquisition must be taken, (3) the prisoner must be bailed by 12 persons.

[3] P. and M. ii 585, 591.

[4] E.g. Habeas Corpus ad prosequendum, testificandum, deliberandum; and Habeas Corpora juratorum, Bl. Comm. iii 130.

[5] H.C. ad respondendum, Bl. Comm. iii 129; Y.B. 13 Henry IV. Mich. pl. 4, a defendant imprisoned by the court of the Staple at Chichester. See on the whole subject an article by Mr Jenks, L.Q.R. xviii 64 and the Year Books there cited.

[6] It was said by Hussey, Y.B. 22 Ed. IV. Mich. pl. 21, "If the Chancellor commits anyone to the Fleet, apply to us for a Habeas Corpus, and upon the return to it we will discharge the prisoner."

upon their contest for superiority with the Chancery, the Court of Requests, the various branches of the Council, and the Admiralty, they naturally had recourse to their old weapon.[1] It is clear that the writ is becoming something much more important than a mere step in procedure. It is gaining a place in public law. It is not, however, till the 17th century that the exact place which it will occupy in public law is definitely ascertained. We shall see that under the earlier Stuarts the Council, the Chancery, the Court of Requests, and to some extent the Admiralty leaned upon the prerogative, while the common lawyers formed the back bone of the Parliamentary opposition, and impressed upon the constitutional struggle a technical character which it never wholly lost.[2] It was only natural therefore that the common lawyers should use for the protection of the liberty of the subject the weapon which they had found to be effective for the protection of their jurisdiction.[3] It is probably in some such way that the writ of Habeas Corpus has become famous in constitutional law. When it had successfully attained its distinguished position it very naturally desired a pedigree. It was not difficult to assign as its ancestor some clauses of Magna Carta the real meaning of which had been forgotten.[4]

Its character was fixed at the latter part of the 17th century. As with other common law doctrines and principles, so with the writ of Habeas Corpus, its position was unquestioned after the Great Rebellion.[5] Hale[6] can describe it as "a writ of a high nature, for if persons be wrongfully committed they are to be discharged upon this writ returned; or if bailable they are to be bailed; if not bailable they are to be committed."

We have seen that in certain cases only the writ could issue from the Common Pleas;[7] and what has been said as to the Common Pleas will apply to the

[1] Glanvil's case (1615) Moore 838, and the other precedents there cited for releasing persons committed by the Chancery or the Council; Select Cases in the Court of Requests (S.S.) xxxvi-xlv; Select Cases in Admiralty (S.S.) ii xlvi, xlvii; Agreement of the judges as to Admiralty jurisdiction made 1575, cited Prynne, Animadversions 99; The opinion of the judges as to the occasion on which they will release prisoners committed by the Council, below 285. Its use in connection with commitments by the High Commission, 4th Instit. 331.

[2] Below 246-250, 285-291.

[3] Selden, in his argument at the conference between Lords and Commons in 1628 (3 S.T. 95) calls it "the highest remedy in law for any man that is imprisoned."

[4] Magna Carta c. 39; Above 36, 95; P. and M. i 152 n. 2.

[5] Below 291, 292. Cp. Bushell's case (1670) Vaughan Rep. at p. 136.

[6] 2 P.C. 143.

[7] Above 78.

Exchequer. The King's Bench, and possibly the Chancery, were the courts which had an original jurisdiction to grant the writ.

In civil cases the King's Bench in vacation or in term time would grant the writ of Habeas Corpus *ad faciendum et recipiendum*. It was this form of the writ that the Common Pleas and Exchequer would grant in certain cases. The Chancery never issued this form of the writ. In criminal cases the King's Bench, in term time only, would grant the writ of Habeas Corpus *ad subjiciendum*.[1] This could not be issued by the Common Pleas or the Exchequer at common law. The Chancery could not issue it in term time. Whether or not it could do so in vacation is doubtful.[2]

There have been three chief statutes which have extended the efficacy of this writ.

(1) 16 Charles I. c. 10 § 8 dealt with persons committed to prison by the Council or by the command of the king.[3] In such cases either the King's Bench or the Common Pleas were allowed to issue the writ. Within three days of the return the court must examine the cause of the detention certified by the writ.

(2) 31 Charles II. c. 2 effected a general improvement in the writ of Habeas Corpus *ad subjiciendum*, i.e. in criminal cases. The Lord Chancellor and any of the judges of the superior courts must issue the writ in vacation or in term, unless the prisoner is committed for treason or felony plainly expressed in the warrant of commitment, or is in prison on conviction for crime, or by some legal process.[4] The time is specified within which the return of the writ must be made, and within which the court or judge must adjudicate on the writ.[5] Gaolers must deliver to prisoners a true copy of the warrant of commitment.[6] No persons released by writ of Habeas Corpus may be again committed for the same offence.[7] Prisoners indicted for treason or felony must be tried at the next sessions or bailed; but if it appear that the king's witnesses could not be ready at that time they may be committed till the following term; if not tried then they must be discharged.[8] No persons are allowed to alter a prisoner's place of confinement except in certain specific cases defined by the act.[9] No prisoners may be sent to Scotland, Ireland, or parts beyond the seas.[10] The writ is to run into the counties palatine and all other privileged places.[11]

[1] App. XVI. [2] Cp. Hale, 2 P.C. 147, 148, and Bl. Comm. iii 132.
[3] L.Q.R. xviii 76. [4] §§ 3 and 10. [5] §§ 2 and 3. [6] § 5.
[7] § 6. [8] § 7. [9] § 9. [10] § 12. [11] § 11.

As the intent of the act was evaded by the requirement of excessive bail, the Bill of Rights provided that such excessive bail should not be required.[1]

(3) 56 George III. c. 100 extended the act of Charles II. to the case of persons imprisoned for other than criminal offences (except in the case of imprisonment for debt), and gave to the court the power to examine into the truth of the facts set forth in any return made to the writ.[2]

3. The court of Exchequer.

We have seen that the Exchequer as a department of state was in some degree separate from the main body of the Curia Regis as early as Henry II's reign.[3] We must now trace the history of the process by which the court of Exchequer becomes a law court distinct from the department of state which controls the revenue. We shall see that, though it becomes a law court, taking rank by the side of the other two law courts, it always preserved the traces of its ancient origin.

Bracton does not mention the Exchequer as a separate court. We can see, however, from Britton that by Edward I.'s reign it was tending to become a court which could be classed with the other two law courts. "Also, our will is, that at our Exchequers at Westminster and elsewhere, our Treasurer and our Barons there have jurisdiction and record of things which concern their office, and to hear and determine all causes relating to our debts and seignories and things incident thereto."[4] Fleta also classes it with the other two courts.[5] In fact the abolition of the office of justiciar in 1234 tended both to increase the separation between the Curia Regis and the Exchequer, and to separate the judicial from the financial side of the Exchequer. Before 1234 the term Baron and the term Justice seem to be used almost indifferently.[6] All the judges could sit there, and so sitting there, were privileged in certain ways. After that date three persons are named specifically to sit at the Exchequer "tamquam Barones," and, "pro negotiis nostris quæ ad idem Scaccarium pertinent." The judges of the court of

[1] 1 Will. and Mary St. 2. c. 2.

[2] §§ 1, 3, and 4. Less important branches of the jurisdiction of the court are (1) Trials of causes depending in Chancery where the issue is sent into the K.B. to be tried, (2) Scire Facias to execute judgments of other courts removed into Chancery and sent by mittimus into the K.B. to be proceeded with to execution, Hargrave's Law Tracts i 361. [3] Above 28. [4] i p. 5.

[5] II. 2. 6 and II. 25; cp. I. 48. 1, where he speaks of "loquelæ pendentes adjornandæ coram justiiciariis de Banco et coram rege et ad scaccarium." P. and M. i 170-172. [6] Foss, Judges ii 195.

Exchequer from that date are termed Barons, and cases are heard before the Treasurer and Barons.[1] This does not mean that the Exchequer became at once a separate court. As we have seen Bracton does not mention it as a separate court; and, as was the case with the court of King's Bench, it was only by degrees that it lost its close connection with the King, the Common Law Courts, and the Council.

Madox shows that Henry III. sat at the Exchequer on eight several occasions during his reign.[2]

We have seen that up to the reign of John cases of all kinds were heard at the Exchequer.[3] Magna Carta enacted that certain common pleas should be heard either before the court of Common Pleas or the justices of assize.[4] The Exchequer, however, still continued to hear these cases. In 1270 Henry III. ordered the Treasurer and Barons to send all such pleas to be heard before the justices of the Bench because they were a hindrance to the sheriff and others accounting at the Exchequer.[5] In 1277 Edward I. was obliged to issue a similar order.[6] The Statute of Rutland § 11[7] and the Articuli super Cartas c. 4[8] contained similar provisions. But in 1302 a royal ordinance to the same effect was found necessary, and similar orders are found in Edward II.'s reign.[9] But in spite of these ordinances the practice was not fixed. The king frequently allowed individuals to proceed in the Exchequer in respect of matters wholly unconnected with the revenue. We find the court in Edward I. and Edward II.'s reign holding pleas, not only of private debts, but also of trespasses.[10] These irregularities ceased when the practice of the court became more fixed and the personal interference of the king less possible. But, as we shall see, the Exchequer by means of a fiction retained its control of common pleas.

Similarly up to the reign of Edward II. the Exchequer

[1] Britton i p. 97; Coke, 4th Instit. 103; Madox ii 54, 55; Manning. Exchequer of Pleas i 480 n.; Y.B. 16 Ed. III. ii (R.S.), xxxviii, xxxix.

[2] Madox ii 10, 11, 102.

[3] Above 30.

[4] §§ 17 and 18.

[5] Madox ii 73.

[6] Ibid 74.

[7] 10 Edward I.

[8] 28 Edward I.; Coke, 4th Instit. 113, 114.

[9] Madox ii 74, 75; P. and M. i 172 n. 1. The encroachments of the jurisdiction of the Exchequer do not seem to have been originally popular, just as the jurisdiction of the Chancellor was not at first popular (below 199 n. 1). The reason was perhaps the same. They did not administer the common law. The people had, as Mr Pike says, "a superstitious reverence for the common law . . . and a dislike for the Exchequer which they regarded as the protector or instigator of the sheriffs in all real or supposed extortions," Y.B. 14 Ed. III. (R.S.) xxix.

[10] Madox ii 81.

frequently acted with the Council. We often find that cases are discussed not only by the Treasurer and Barons but also by the Lord Chancellor, the judges of either Bench, and others of the Council.[1] The Lord Chancellor disappears after Edward II.'s reign. As early as Henry III.'s reign most of his duties in connexion with the Exchequer had been turned over to the Chancellor of the Exchequer. In 1234 John Mansel had been appointed to that office to secure an efficient check on the Treasurer.[2] It was through the Chancellor of the Exchequer that the two sides of the Exchequer, the judicial and the administrative, long maintained their connexion. The Chancellor of the Exchequer was the chief judge of the equity side of the court. In 1732 Walpole heard a case, and, as the four Barons were equally divided, he practically decided it.[3] It long remained the custom that the Chancellor of the Exchequer should, on his being sworn in, take his seat on the Bench, and hear some motion moved by the senior barrister on the equity side of the court.[4]

The Exchequer, like the King's Bench, was not fixed at any certain place. Though it usually sat at Westminster we find it in Edward I.'s reign at Shrewsbury and York. It was at York, also, in Richard II.'s reign.[5] From Edward II.'s reign both its place and its constitution as a law court tend to become more fixed. In 1312 Walter de Norwich was appointed Chief Baron; and from that date we may say that it exists as a distinct court.[6] It is not for some time, however, that it takes rank with the other common law courts. The Chief Baron of the Exchequer was usually a lawyer. In fact in the reigns of Henry IV., Henry V., Henry VI., and Henry VII., the Chief Baron was also Chief Justice of the Common Pleas.[7] But the other Barons "were not commonly men of legal education. They were usually raised to the bench from their practical knowledge of the revenue acquired in minor offices connected with it."[8] They do not appear among the judges of assize.

[1] Madox ii 29-32, 102.

[2] Madox ii 51, 52. He is appointed "ad residendum loco nostro ad Scaccarium nostrum de Recepta et ad habendum rotulum unum de hiis quæ ad prædictam Receptam pertinent." See Fleta II. 27. 1.

[3] Foss, Judges viii 84.

[4] Ibid viii 215. The senior barrister on the equity side of the court was called the "Tubman"; on the common law side, the "Postman," Bl. Comm. iii 28 n. a.

[5] Foss, Judges iii 22, 23, 337; iv 15.

[6] Ibid iii 196. Dugdale, Chronica Series 32, says that William de Carleton (1303) was the first Chief Baron. But cf. Foss, loc. cit. Thomas de Canteling seems to have held a patent of precedence. His successor Walter de Norwich was the first to be styled C.B.

[7] Foss, Judges iv 135, 191, 230; v 95.

[8] Ibid iii 348. See 14 Edward III. St. 1 c. 16. This statute defines the persons who may take cases at nisi prius (below 117). It enacts that if the justices of

They take rank after serjeants.[1] Their names do not appear in the Year Books.[2] They were not members of Serjeant's Inn to which all the judges belonged.[3] They were not summoned to Parliament, nor had they chaplains like the other judges.[3] They continued to hold this inferior position till Elizabeth's reign. In 1579 owing to the increase in litigation, and the growth of the jurisdiction of the Exchequer over common pleas, it was determined to place the Barons of the Exchequer on a footing of equality with the judges of the other courts.[4] When, in that year, Robert Shute was appointed, his patent declared that, "he shall be reputed and be of the same order, rank, estimation, dignity, and pre-eminence to all intents and purposes as any puisne judge of either of the two other courts."[5] From that time all the Barons are serjeants and go the circuits like the other judges. We may see, however, a reminiscence of the older status of the Baron in the wording of the statute book. When the Barons are, with the other judges, empowered to do certain judicial acts, the expression used is "Barons being of the degree of the coif."[6]

When the Barons of the Exchequer were thus chosen from among lawyers, it is clear that some official was needed to supply the technical knowledge in matters of account, which the Barons had formerly possessed. We first hear of such an official in James I.'s reign under the name of the Cursitor Baron. In 1610 Thomas Cæsar is made Cursitor Baron. "The title was adopted in imitation of the old cursitors in Chancery, who, being under the chief clerks, were called Clerici de cursu and prepared writs of course."[7] The cursitor baron did merely ministerial and formal business appertaining to the ordinary course of the Exchequer.[8] His

the one Bench or the other do not come into the county the nisi prius cases may be heard by "the chief baron of the Exchequer if he be a man of the law." The other barons are not mentioned.

[1] Foss, Judges iv 15. Fortescue, De Laudibus c. 50, says that when a serjeant is made a judge the value of the rings he gives to the B.B. of the Exchequer is smaller than the value of those given to the C.B. and the J.J. of the other courts.

[2] Foss, Judges v 11.

[3] Ibid 95.

[4] Ibid 409, 410; vi 18-21.

[5] In 1591 the orders for the regulation of readings in the Inns of Court are made by the judges and Barons; not as before by the justices of either bench, Foss, v 410.

[6] I.e. having attained the degree of serjeant, 31 Charles II. c. 2 § 3; 56 George III. c. 100 § 1.

[7] Foss Judges vi 16-27, 24.

[8] Vernon on the Exchequer (1642) (cited Foss, Judges vi 25, 26) says that his duty is "to inform the bench and the king's learned counsel from time to time both in court and out of court what the course of the Exchequer is."

chief duty was to examine and audit the accounts of the sheriffs. These duties were handed over to Commissioners for auditing the public accounts in 1834.[1] The office was abolished in 1857.[2]

The jurisdiction of the Court of Exchequer can be grouped under three heads. (1) It was a court of revenue. (2) It was a court of common law. (3) It was a court of equity. The revenue jurisdiction is the oldest. The two other branches of its jurisdiction were grafted upon it at a time when each judge grasped at any kind of jurisdiction (and its profits) which he could obtain.

(1) It was a court of revenue held before the Treasurer and the Barons. This court of revenue decided questions between the crown and the taxpayer, and between the crown and the accountants to the crown. As a court of revenue it had certain peculiarities in its jurisdiction which presented analogies both to the Courts of Common Law and to the Court of Equity. These peculiarities are known as the cursus scaccarii.[3] It was by following up the analogies so suggested that the court of Exchequer became a court of common law and a court of equity as well as a court of revenue. We shall see that the jurisdiction of the Exchequer as a court of equity has been taken away by statute. This statute did not take away the peculiarities which characterised the jurisdiction of the court of revenue by virtue of the cursus scaccarii, even though these peculiarities gave in substance a kind of equitable jurisdiction.[4] By virtue of the cursus scaccarii, "all kinds of equitable matter raised either on suggestion, petition, or plea were dealt with, and parties furnished with summary means of asserting their rights against the crown, and of having the matter determined at once by the court, in a way wholly dissimilar to the practice of any other court, and presenting a peculiar union of legal and equitable procedure."[5] A good instance of this peculiar union of legal

[1] 3, 4 Will. IV. c. 99.

[2] 19, 20 Vict. c. 86. At that time almost his sole remaining duty was to notify the crown's assent in the Exchequer to the election of the sheriffs of London, Foss ix 109.

[3] Dialogus (Præfatio) "Sane scaccarium suis legibus . . . subsistit." So Pollock, C.B. (Atty-General v. Halling (1846) 15 M. and W. at p. 693). "It (the court) has been in the constant habit of proceeding both after the forms of other courts of common law and in the manner also of a court of equity. The 'course of the Exchequer,' involving both these modes of procedure, is part of the ancient and general law of the realm."

[4] Atty-General v. Halling 15 M. and W. 687 dissenting from Atty-General v. Corporation of London 14 L.J.N.S. Ch. 305.

[5] Atty-General v. Halling 15 M. and W. at p. 698.

and equitable procedure used in the Exchequer, sitting as a court of revenue, is furnished by the power possessed by it of removing matters affecting the revenue or the property of the crown from the cognisance of other courts. Eyre, C.B., described it as a kind of injunction to stay proceedings in another court qualified by the liberty given to sue in the Exchequer. He speaks of it as being of a piece with the anomalous jurisdiction of the court of revenue in the Exchequer, which has here adopted an equitable, rather than a legal procedure.[1] The reforms in practice and procedure made by the Common Law Procedure Acts[2] only applied to the Revenue side of the Exchequer in so far as they were expressly made to do so by the Queen's Remembrancer's Act and the Crown Suits Act.[3] Even at the present day certain parts of the Exchequer practice and procedure present peculiarities which have disappeared from the other courts.

(2) It was a court of common law held before the Treasurer and the Barons. The court of Exchequer like the other Common Law Courts had exclusive jurisdiction over the officials of the court. This existed as early as Henry II.'s reign. The Dialogus mentions several privileges possessed by the Barons and other officers of the Exchequer.[4] "The records of the subsequent times," says Madox,[5] "speak more distinctly. They mention the privilege of impleading and being impleaded in the Exchequer only; freedom from toll for things bought for their own use; freedom from suit to county courts, hundred courts, etc.; and other privileges. It is also to be understood, that several of the residents at the Exchequer had privilege not only for themselves, but also for their clerks and their men." The rights and privileges possessed by the court were thus wider, though similar in kind, than those possessed by the other courts.[6] It possessed another privilege which was peculiar to it. The crown had peculiar advantages with regard to debts owing to it. Among these advantages was the right of the crown to require payment from the debtor of its debtor, and from the debtor of that

[1] Cawthone v. Campbell, Lowndes, and others, cited Manning, Exchequer of Pleas i 164 seqq.; cp. 2 Salk. 546, it is there said that "where one entitled to the privilege of the court is sued in C.B., this court sends a supersedeas; but if it be in B.R. they do not send a supersedeas, for that would be to supersede the king; but the practice is to send up the writ book by the puisne baron, and demand privilege."

[2] 16, 17 Vict. c. 113; 17, 18 Vict. c. 125.

[3] 22, 23 Vict. c. 21; 28, 29 Vict. c. 104; Atty-General v. Sillem (1864) 10 H.L.C. 704; Below 414.

[4] I. 8. [5] ii. 12. [6] Above 78, 83.

debtor to an indefinite extent.[1] When statutes and ordinances were passed to prevent the court from holding common pleas, the court made this right of the crown the foundation of a fiction by means of which they secured a jurisdiction which the legislature had denied to them. The plaintiff[2] who wished to sue for breach of contract or other injury was supposed to be a debtor to, or an accountant of the crown; and it was supposed that unless he could recover his debt or damages he was thereby the less able (quo minus sufficiens existit) to satisfy the crown. By means of this writ of Quominus the court obtained a general jurisdiction over common pleas.[3] Proceedings in this court began by writ of Quominus, just as proceedings in the court of King's Bench began by Bill of Middlesex and Latitat, till the Uniformity of Process Act (1832).[4]

(3) It was a court of equity held before the Treasurer, the Chancellor of the Exchequer, and the Barons. We have seen that the jurisdiction of the court as a court of revenue involved the possession of certain equitable powers. This was recognised as early as Henry II.'s reign—though the term "æquitas" was not then used in the same technical sense which it afterwards acquired.[5] We shall see that equitable jurisdiction became the peculiar province of the Lord Chancellor. The court of Exchequer had its chancellor. It also possessed certain equitable powers which were defined and enlarged by the statute 33 Henry VIII. c. 39.[6] It was only natural that the court of Exchequer should assume a general equitable jurisdiction like that assumed by the Lord Chancellor.[7] The writ of Subpœna—the peculiar process of

[1] Dialogus II. 16; Coke, 2nd Instit. 551; Attorney-General v. Poultney (1665) Hardres 403, 404, Hale, C.B., showed how this principle should have been limited. He said suppose A indebted to the king in £100; B to A in £1000; C to B in £10,000. "These several debtors should have the benefit of the king's prerogative against lands and goods for recovering their several debts. There would be no inconvenience if the king's debt were so levied, though in the 10th degree . . . but to make the king's prerogative instrumental . . . to satisfy other men's debts (i.e. in this case to recover the £900 or the £9900) would be unreasonable, inconvenient, and mischievous to the subject," cf. Coke, 4th Institute 110, 115.

[2] When the plaintiff is privileged the suit is by Quominus (App. XXI): where the defendant is privileged the suit is, as in other courts, by Bill, 2 Salk. 546.

[3] Bl. Comm. iii 286; App. XXI. [4] 2 Will. IV. c. 39.

[5] Dialogus I. 4. The duty of the officials is "ut regis utilitati prospiciant; salva tamen æquitate secundum constitutas leges scaccarii."

[6] Coke, 4th Instit. 118, 119, was ignorant of the origin of this jurisdiction. He based it partly on the possession of a chancellor, partly on the act 33 Henry VIII. c. 39.

[7] Spence i. 352, points out that the Counties Palatine also "silently assumed extraordinary jurisdiction similar to that which was exercised in the court of Chancery"; Pike, H. of L. 298, 299.

the Court of Equity—was certainly known in the Exchequer as early as Henry IV.'s reign.[1] It is generally used in 1574.[2] The flexible nature of the rules of equity in the 15th and 16th centuries, and its administration through common law forms,[3] made it the easier for a court which possessed affinities with the Common Law Courts and with the Court of Equity, to assume this equitable jurisdiction. In the end the court of Exchequer obtained a general equitable jurisdiction on grounds similar to those upon which it obtained a general common law jurisdiction. "Any person," says Blackstone, "may file a bill against another upon a bare suggestion that he is the king's accomptant; but whether he is so or not is never controverted."[4] This jurisdiction was taken away in 1842[5] and handed over to the court of Chancery. The result was to leave the court of Exchequer its peculiar jurisdiction as a court of revenue, and its common law jurisdiction over common pleas.

4. The Court of Exchequer Chamber.

We must distinguish two courts of Exchequer Chamber which differed both in their origin and their history.

(1) The court of Exchequer Chamber which heard appeals from the court of Exchequer.[6]

The Barons of the Exchequer always denied that the court of King's Bench had power to amend errors in the Exchequer. 11 Edward III., they addressed a memorial to the crown showing from the history of the Exchequer that the court of King's Bench had never had this jurisdiction. They showed that if error was alleged the king issued a special commission to the Barons "associatis sibi aliis fidelibus Regis" to examine and correct the error.[7] We have seen that the position of the court of Exchequer was for a long period very different from

[1] Cotton, Records 410; Reeves, H.E.L. ii 495, 496; Coke, 4th Instit. 119. A petition of 3 Henry V. (4 Rot. Parl. 84) complains of writs of Subpœna sued out of the Chancery *and the Exchequer* for matters determinable at Common Law. App. XVII, B.

[2] Manning, Exchequer of Pleas i 38. [3] Below 235, 236.

[4] Comm. iii 45, 46. Cf. Attorney-General v. Halling, 15 M. and W. at p. 693. "The course of the Exchequer involving both a form of legal and equitable procedure, the usurped jurisdiction naturally divided itself in this way; and after so dividing itself the branches became gradually entirely separate, and formed two separate sides, the plea side and the equity side of the court—the revenue, however, still remaining as before and involving both."

[5] 5 Vict. c. 5. The jurisdiction had been regulated 57 Geo. III. c. 18; 1 Geo. IV. c. 35; 3, 4 Will. IV. c. 41, § 25; 6, 7 Will. IV. c. 112.

[6] I.e. from the revenue and plea side of the court. Appeals from the equity side of the court went direct to the House of Lords (Bl. Comm. iii 46). But for errors in law a bill of review could be brought in the same court as was the case in Chancery (Hardres 174). [7] Y.B. 14 Edward III. (R.S.) xvii-xxix.

the position of the other courts of law. "The principle," says Mr Pike,[1] "which is clearly brought out in all the documents relating to the matter, is that judgments in the Exchequer were not judgments at common law. The natural corollary was that when error was alleged, these judgments could not be either affirmed or reversed in the same manner as judgments at common law. In other words, the King's Bench might correct a judgment of various courts of record, including the court of Common Pleas, but could not correct a judgment of the court of Exchequer."

The Barons made good their position.[2] The act of 31 Edward III. St. 1 c. 12 established a court to hear errors in the Exchequer. The constitution of that court followed the lines suggested by the Barons in 1338. It enacted that "where a man complaineth of error made in process in the Exchequer, the Chancellor and Treasurer shall cause to come before them in any Chamber of council nigh the Exchequer, the record of the process out of the Exchequer, taking to them the justices and other sage persons such as to them seemeth to be taken . . . . and if any error be found they shall correct and amend the rolls."

We find, however, in 1 Richard II.[3] the commons again petitioning that errors in the Exchequer be redressed in the King's Bench. The reply to the petition was that a statute had been made which must be observed. The reason for petitions of this kind were the great delays of this court. If the court was adjourned to a fixed day, and the Chancellor and Treasurer did not appear on that day, the writ of error discontinued, and the plaintiff was obliged to begin the action again. As many as six writs have been found on the record.[4] 31 Elizabeth c. 1 recites that "these two (the Chancellor and the Treasurer) being great officers of the realm. . . . they be many times upon sudden warning called away," so that they cannot be present at the day of adjournment in the Exchequer; and enacts that, if either one of them, or both of the chief justices be present, there shall be no discontinuance. No judgment could, however, be given

[1] Y.B. 14 Edward III. (R.S.) xxix.

[2] There are several instances of commissions addressed to members of the Council, judges and others, 2 Rot. Parl. 154 no. 41 (18 Ed. III.) Coke, 4th Instit. 105, 106; 21 Ed. III. (2 Rot. Parl. 168 no. 26), the petition was that errors be redressed in the King's Bench, and not by the same persons who gave the judgment, "Car il n'est mye semblable a verite homme doit avoir bone conceite contre sa opinion demesne." In this case the Chancellor, Treasurer, and two J.J. were assigned to hear the case.

[3] 3 Rot. Parl. 24, no. 105.

[4] Manning, Exchequer of Pleas i 482.

unless they were both present.[1] It was provided by 20 Charles II. c. 4 that the Lord Keeper could give the judgment of the court during the vacancy of the office of Lord Treasurer.

The judgment of the Exchequer Chamber was given by the Treasurer and Chancellor. The judges were merely assistants. This was one of the points settled in *The Banker's Case*.[2] Lord Keeper Somers, in accordance with that view, reversed the decision of the court of Exchequer contrary to the opinion of the majority of the judges.

(2) The court of Exchequer Chamber which heard appeals from the court of King's Bench.

There was an old practice by which cases of difficulty occurring in either of the three Common Law Courts might be adjourned to be argued before all the judges and the Barons in the Exchequer Chamber. After a full discussion of the case judgment was given by the court in which the proceedings had begun.[3] This practice continued certainly as late as the 17th century.[4]

This, however, was a matter which depended entirely upon judicial practice. Such trials before all the judges in the Exchequer Chamber must be distinguished from the court of Exchequer Chamber created by 27 Elizabeth c. 8 for the purpose of amending the errors of the King's Bench. The statute recites that erroneous judgments in the King's Bench could only be reformed in Parliament, and that that court "is not in these days so often holden as in ancient times it hath been." It enacts that where any judgment shall be given in the King's Bench in any action of debt, detinue or covenant, account, action upon the case, ejectione firmæ, or trespass (if first begun in the King's Bench), except where the crown is a party, the plaintiff or defendant could sue out a writ of error either to Parliament or to the court of Exchequer Chamber.[5] It provides that the court of Exchequer Chamber shall consist of the justices of the Common Pleas, and the Barons of the Exchequer, or any six of them.[6] An appeal

[1] The same provision is made in case of the absence of the Chancellor and Treasurer on the days when writs of error were returned by 16 Charles II. c. 2.

[2] 14 S.T. 1; 5 Mod. 29; Carth. 388 (1696).

[3] Capel's case 1 Co. Rep. 62; Shelley's case ibid 106; Chudleigh's case ibid 132; Reeves, H.E.L. iii 668 n.n. a and b.

[4] The practice was followed in R. v. Hampden (1637) 3 S.T. 825.

[5] That the party had this election was made clearer by 31 Eliza c. 1 § 4. The statute 27 Eliza. c. 8 did not apply to errors assigned for want of jurisdiction or want of forms in the writ or pleadings (§ 2).

[6] 31 Eliza. c. 1 § 2. It sufficed if three were present at the days of return of the writs or adjournments, the whole six must however give judgment.

to this court was not to preclude a further appeal to Parliament.[1]

After the passing of this act error still lay from the Common Pleas to the King's Bench, and from thence direct to the House of Lords. Error still lay direct from the King's Bench to the House of Lords in all proceedings other than those mentioned in the act of Elizabeth. It was only in those proceedings specified in the act (if originally begun in the King's Bench) that this court of Exchequer Chamber had jurisdiction.[2]

In 1830[3] the two branches of the Exchequer Chamber were practically amalgamated, and the court of Exchequer Chamber was made a court of appeal intermediate between the three Common Law Courts and Parliament. The court consisted of the judges of the two courts which had not given the decision against which the appeal was brought.

Each of the Common Law Courts possessed a large staff of officials.[4] Their offices had gradually sprung up as the business of the courts increased. They were paid by fees; and as the number of cases grew greater their pay came to be out of all proportion to the services which they rendered. The money thus taken from the suitor was used partly to help remunerate the judges. Many of these offices were in their gift. They could either appoint themselves or sell the appointment. Thus the Lord Chief Justice of the King's Bench usually held the office of Chief Clerk of the King's Bench; and in 1810 it was reported that 13 offices in the court of King's Bench, and 21 offices in the court of Common Pleas were saleable.[5] But though indirectly some of these offices may have thus served a useful purpose, it is clear that the whole system tended to make the course of justice at once expensive and slow. A reference to the appendix, in which the offices of the court of King's Bench existing in 1815 are set out in tabular form, will make this clear.[6] The condition of the other Courts of Common Law was very similar.

It was not till 1815 that any attempt was made to enquire into the state of the Courts of Common Law. A commission

[1] § 3.
[2] Bl. Comm. iii 411.
[3] 11 Geo. IV., 1 Will. IV. c. 70 § 8.
[4] Full information on this subject will be found in Parliamentary Papers 1874 vol. xxiv, 2nd Report of Commission appointed to enquire into the Administrative Departments of Courts of Justice.
[5] Parliamentary Papers 1810 vol. ix, Report from Commissioners on Saleable Offices in Courts of Law.
[6] App. XXV. Similar tables of the other courts are printed in the Report of 1874.

had it is true been appointed in 1732 to enquire into the Courts of Common Law and Equity, and the Ecclesiastical Courts. But it had confined its enquiries to the Court of Chancery. The commissioners of 1815 had no guide upon that part of their enquiries which dealt with the Courts of Common Law. They presented reports upon the Courts of Common Law and the Exchequer Chamber in 1818, 1819, and 1822.

The consequence of these reports was a rearrangement of the salaries of some of the judges and the abolition of a large number of sinecure offices.[1] Special acts were passed in the case of some of these offices.[2] A more general act of 1837 abolished 20 offices in the court of Queen's Bench, 16 in the court of Common Pleas, and 9 in the court of Exchequer, and 1 in the court of Exchequer Chamber.[3] The act then created the office of master with a fixed salary. It attached 5 masters to each court, and placed upon them the duties of the officials whose offices had been abolished. In 1843[4] the crown office attached to the court of Queen's Bench was remodelled. In 1852[5] the clerical staff of the judges and the subordinate officers of the courts (ushers, court keepers, etc.) were reformed. The result of these changes was that up to the time of the Judicature Acts there were two chief classes of officials attached to the Common Law Courts. They were the Masters and the Associates. Each of them possessed a staff of clerks. All officials were paid by fixed salary.

The duties of the Masters were to attend court in rotation, to hear summonses and make interlocutory orders, to hear matters referred by the consent of parties or by order of the court, to tax bills, to report on matters referred by the court. In their offices was done all the business incidental to legal proceedings. The action of the court in all its stages was there initiated and recorded. The titles of their various offices—the writ of summons office, the appearance to the summons office, the rule office, the judgment office, sufficiently illustrate the work done.

There were three Associates attached to each court. They sat in court when the judge was sitting at nisi prius. Their duties were to impanel juries, to call on the causes, to read

[1] 6 Geo. IV. c. 82 (King's Bench); 6 Geo. IV. c. 83 (Common Pleas); 6 Geo. IV. c. 84 (Salaries). [2] 6 Geo. IV. c. 89; 8, 9 Vict. c. 34.

[3] 7 Will. IV. and 1 Vict. c. 30. It is recited that "there are many offices whose duties have wholly or in part ceased, or are executed by deputy, and whose offices have become, by changes in the law, useless. . . ."

[4] 6, 7 Vict. c. 20. [5] 15, 16 Vict. c. 73.

documents put in, to receive verdicts. At Chambers they made for the judge an abstract of the record of causes to be tried before him, they received the list of suitors, they handed the postea [1] to the successful party.

These were the two chief classes of officials. In addition there were still surviving two other of the older officials. The Queen's Coroner and Attorney had functions on the crown side of the court of Queen's Bench similar to those of a master on the Plea side. The Queen's Remembrancer was an official of the court of Exchequer whose duties also were similar to those of a Master. He had, in addition, certain ceremonial duties to perform in connection with swearing in the Lord Chancellor, the Barons of the Exchequer, and the Lord Mayor of London. He protected the interests of the crown, if he saw that they were likely to be inadvertently affected in the course of any cases heard in the Exchequer. He could originate proceedings for penalties, debts, and duties due to the crown.

Thus while each court still kept a distinct class of officials, the staff of each court was arranged on a simple and uniform plan.

II. The Itinerant Justices.

We have seen that in Henry II.'s day justices travelled round the country to try cases falling under the jurisdiction of the Curia Regis, and to superintend on behalf of the Curia Regis the working of the local government of the country.[2] Justices who acted under these extensive commissions "ad omnia placita" are known as the justices in eyre. We have seen also that in the commission of assize, which is regulated by Magna Carta, a commission giving a less extensive jurisdiction than that possessed by the justices in eyre was then well known.[3] We shall see that these justices of assize practically took over most of the judicial work formerly done by the justices in eyre. The subject will therefore fall under these two heads (1) the justices in eyre (2) the justices of assize.

(1) The justices in eyre.[4]

The justices in eyre reviewed the whole working of the local government, judicial, administrative, and financial since the preceding eyre. Their judicial business was perhaps the

[1] For the meaning of this term, see below 117.
[2] Above 32. [3] § 18.
[4] The style of the court is "Placita de Juratis et Assisis et Coronæ de itinere Johannis de Vallibus et sociorum Justic' Itiner' apud Ockham in com' Rutland in crastino Epiphaniæ Domini, Anno regni Regis Edw. 14," Coke, 4th Instit. 184.

most important in Bracton's day.[1] But a clear distinction between these different departments of government is only gradually emerging.[2] We shall see that the articles of the eyre travelled over the whole field of government.

At least fifteen days before the beginning of the eyre a general summons was sent to the sheriff ordering him to summon the archbishops, bishops, barons, knights and freemen of the county; from each township the reeve and four legal men, from each borough twelve legal burgesses. The summons directed him to adjourn before the justices in eyre all pleas of the crown pending since the last eyre, and all civil pleas then before the justices of assize or the court of Common Pleas; to give notice that all who had been sheriffs or coroners since the last eyre must appear before the justices and deliver up any records which they had in their possession; to summon all who claimed any liberty or franchise to appear to claim it, and to be ready to show by what warrant they held it. The sheriff and his officers were directed to be constantly attending upon the justices to give them any necessary information. Public proclamation must be made that all who have any complaints concerning royal or other officials must come forward and make them.[3]

In the court thus held by the justices in eyre the old county court and the Curia Regis meet. We can see the Curia Regis in the royal justices, in their royal jurisdiction, in the newer forms of procedure. We can see the old county court in the persons summoned to attend.[4]

When the justices appear the writ giving them authority is read.[5] The chief of the justices then usually addressed the court showing "quæ sit causa adventus eorum, et quæ sit utilitas itinerationis, et quæ commoditas si pax observetur."[6] Bracton[7] tells us that it was then the practice of the

[1] Bracton (ff. 116, 116 b) in describing the articles of the eyre puts the pleas of the crown first.

[2] Maitland, Pleas of the Crown for the county of Gloucester xxvi, says, "We might classify the articles under the two heads of revenue and crime, but in so doing might overlook the fact that a distinction between the doing of penal justice and the collection of the king's income is only gradually emerging. The itinerant judge of the 12th century has much of the commissioner of taxes."

[3] For such a summons see App. XXII, B, and cp. Y.B. 30, 31 Edward I. (R.S.) lv-lx for a description of the eyre. Reeves, H.E.L. i 459-462.

[4] P. and M. i 531; Northumberland Assize Rolls (Surtees Society) xi.

[5] For the writ see App. XXII, A. See App. XXII, C, for the writ recalling all cases to the ordinary courts at the close of the eyre.

[6] Bracton f. 115 b. Smith, Republic, writing in 1565, tells us that at the beginning of the circuit "One of the judges briefly telleth the cause of their coming, and giveth a good lesson unto the people." [7] Ibid.

justices to retire and confer with certain "busones"[1] of the county; i.e. persons "ad quorum nutum dependent vota aliorum." In these leading men we can see the persons who appear in the commissions of gaol delivery, and oyer and terminer, and who, as justices of the peace, were in later days to rule the county.

On the return of the justices to court the sheriff surrendered his rod of office and took an oath to loyally do all things appertaining to his office. His rod was then handed back to him, and the other officials of the county took a similar oath. The justices then took the rolls of the sheriffs and the coroners, and the rolls of any sheriffs or coroners who had held office since the last eyre.

The serjeants and bailiffs of the hundreds were then called. They chose four knights. These four chose twelve knights, or twelve free and lawful men, if knights could not be found. These twelve took an oath to faithfully perform their duty. The articles of the eyre were then read over to them. To these articles they were ordered to give a distinct and precise answer by a certain day. They were also ordered to at once arrest any suspected person, or, if this were not possible, to give secretly a list of such persons to the justices.[2]

These articles of eyre ranged, as we have said, over the whole field of government. "Capitula vero," says Bracton, "quæ illis duodecim proponenda sunt, quandoque variantur secundum varietatem temporum et locorum, et quandoque augentur quandoque miniuuntur."[3] As time went on the list tended to grow longer.

In the first place they deal with the pleas of the crown old and new.

In the time of Henry III. most of the serious crimes were dealt with by the justices in eyre.[4] Secondly, enquiry is made as to the neglect of police and other duties by the counties, hundreds, townships, and boroughs. They are amerced for such neglects. As a matter of fact the criminal law was very ineffective. Not many criminals were hung.

[1] As to the meaning of this term see Coke, 4th Instit. 185; P. and M. i 540. The word occurs elsewhere (Plac. Abbrev. 85) so that it is not probable that it is a misprint for "barones." Prof. Maitland suggests that it is connected with "besoin" and means men of affairs.

[2] Bracton f. 116 a.

[3] f. 116 a. Lists of these articles are found Hovenden iii 262-267 (Stubbs, Sel. Ch. 259-263); Bracton ff. 116, 117; Britton i 24-97; Fleta I. 20; Statutes of uncertain date.

[4] Select Pleas of the Crown (S.S.) xxiii; P. and M. ii 642. But criminal justice was very inefficient. Northumberland Assize Rolls xviii, xix, show that in the pleas of the crown for that county in 40 Henry III. there are recorded 77 murders, for only 4 of which were the murderers punished.

But, as Professor Maitland points out, "a just and regular infliction of pecuniary penalties" was "a means of bringing the unprofessional policeman to a sense of his duties."[1] Thirdly, the crown desires information as to its proprietary rights—escheats, wardships and other sources of revenue, as to the user of franchises, and as to the misdoings of officials.

The enquiry was therefore searching. It was also effective, because the justices were not left without a check upon the findings of the jury. They had before them the sheriffs' and and the coroners' rolls. "We are reminded," says Professor Maitland, "of a schoolmaster before whom stands a class of boys saying their lesson. He knows when they go wrong, for he has the book. Every slip is cause for an imposition unless his pupils have purchased a favourable audience."[2]

It is easy to see why the eyre was an exceedingly unpopular institution. The Cornish men in 1233 betook themselves to the woods rather than face the justices.[3] It came to be an established rule that an eyre should not be held more often than once in seven years.[4] In 1261 the county of Worcester declined to admit the justices because the seven years had not elapsed.[5] In the 14th century the rolls of Parliament attest their continued unpopularity. In 1348 the commons petitioned that Eyres and "generals enquerrez per tota la terre" cease.[6] In 1362[7] the commons ask for a pardon of all the articles of the eyre except "pleas of land, quo warranto, treason, robbery, and other felonies punishable by loss of life or member." In 1397 they obtained such a general pardon.[8]

We can see in these petitions that a distinction is drawn between the judicial and the other business of the eyre. In fact the rise of Parliament made the general eyre unnecessary. The king could now get from Parliament any information he desired as to the local government of the country. The regular courts, and itinerant justices acting under less general commissions, supplied, at least in theory, adequate remedies for the wrongs done by private persons as well as by officials.

[1] Pleas of the Crown for the county of Gloucester xxxiii, xxxiv. See a case cited, Hale, 2 P.C. 74, 75, where there were three amercements for one escape—the parson because the person was in his mainpast, the person present when the felony was committed, and the vill because the felony was committed in the daytime; if he had been in a tithing then the tithing would have been amerced.

[2] P. and M. ii 643. [3] P. and M. i 181. [4] This is stated by Britton i 3.

[5] Foss, Judges ii 192. [6] 2 Rot. Parl. 200 no. 4. [7] 2 Rot. Parl. 272 no. 32.

[8] 3 Rot. Parl. 369 no. 77. They specify "trespasses, misprisions, negligences and ignorances, and other articles of the eyre tending to the fine or amercement of communities, townships and individuals as well ministers of the king as others."

Thus in 1346 the duty of enquiring into the misdeeds of sheriffs, escheators, bailiffs of franchises, or jurors was turned over to the justices of assize.[1] The general eyre practically ceased to be used by the reign of Edward III.[2] "As the power of justices of assizes by many acts of Parliament and other commissions increased, so these justices itinerant by little and little vanished away."[3]

(2) The justices of assize.

The word Assisa means originally an assembly or court.[4] The term then becomes transferred to the enactments of such a court. Certain of these enactments in Henry II.'s reign introduced a new procedure for the trial of cases concerning the seisin or possession of freehold lands.[5] The cases in which this procedure was used were called assizes, and the judges who heard the cases were called justices of assize. Magna Carta ordered that commissions should be issued to hear these cases in each county once a year.[6] Other commissions gave to these justices of assize power to deal with other judicial business both criminal and civil. Acts of Parliament also added to their duties. But they were still called justices of assize; even when the assize had become a remedy rarely used. We still talk of the assizes, in the sense of the court held before a judge on circuit, though the assizes, in the sense of possessory remedies, have beenlong ago disused, and are now actually abolished.[7]

We shall describe (1) the various commissions and statutes under which the justices of assize act, and (2) the process by which the courts held by these justices became regularly defined courts. The history of this process will afford some explanation of the reason why the term assize has clung so persistently to these justices.

(1) The justices of assize acting under various commissions and statutes took both civil and criminal business.

The following commission and statutes empowered them to take civil business:—

(*a*) The commission of assize.[8] This was a commission addressed to one or more of the judges of the King's Courts, and to those whom they might choose to associate with

[1] 20 Edward III. c. 6.
[2] Dugdale, Orig. Jurid. 53; Selden notes on Hengham 143.
[3] Coke, 1st Instit. 293 b.
[4] Jacob's Law Dictionary sub voc Assisa; Maitland, Justice and Police 152, 153.
[5] Above 21.
[6] 9 Henry III. c. 12. John's Charter § 18 had said four times a year.
[7] 3, 4 Will. IV. c. 27 §§ 36, 37.
[8] For form of the commission see App. XXIII, A.

themselves, empowering them to take the assizes in certain counties.

(*b*) The statute of Westminster II.[1] c. 30 enabled the justices of assize to take other civil business "at nisi prius." It enacted that, unless a trespass be so enormous that it required special examination, it was not to be determined in the court of King's Bench or Common Pleas; but that a day and place for the trial in the county should be named in the presence of the parties; the same rule was to hold in the case of other pleas pleaded before either of the Benches. Pleas concerning land were afterwards specially added.[2] In all these cases the sheriff was directed to summon the jurors to Westminster only "nisi prius" the justices of assize came into the county.[3] The result of this and subsequent statutes was, that civil cases begun in the court of King's Bench, or Common Pleas, could be heard either by the justices of assize (being judges of one Bench or the other or a king's serjeant), or by the judges of the Common Pleas, or King's Bench, or the Chief Baron of the Exchequer, if specially commissioned to take cases at nisi prius.[4] They were able to try such cases and to give judgment upon them. The justices of assize, therefore, were able to try all kinds of civil cases begun in the Common Pleas or King's Bench where a trial at bar was not ordered by the court. "They act in all points touching the trial and its incidents as and for the court from which the record comes . . . the postea, or record of the proceedings before them, stands in the place of the record of the proceedings at bar before the superior court in which the action is instituted. Such postea is accepted as conclusive, and entered upon the record of the court in banc; and in the great majority of instances the judgment of that court is pronounced as a matter of course according to the result of the trial before the judge of assize."[5]

[1] 13 Edward I. Stat. 1; Reeves, H.E.L. ii 82-84, 301, 302; App. XXIII, B.

[2] 12 Edward II. c. 3; 2 Edward III. c. 16.

[3] It became the practice not to obey the writ of Venire (ordering the summons of the jurors), but simply to return their names on a "pannel" or slip of parchment so that the parties might see them. A fresh writ "distringas," or "habeas corpora juratorum" was then issued containing the nisi prius clause, Forsyth, Trial by Jury 169-171; R. v. Edmonds 4 B. and Ald. at p. 479.

[4] 27 Edward I. Stat. 1 c. 4; 14 Edward III. Stat. 1 c. 16.

[5] Per Willes, J. Ex parte Fernandez 10 C.B. N.S. at p. 44. Hence it is said that "the day at nisi prius and the day in banc are in consideration of law the same." This means that the judge at nisi prius tries the case instead of the court in banc, and that what takes place before him has the same effect as if it had taken place before the court, ibid 51. See the King v. Joliffe 4 T.R. 285, 292, 293.

The postea was usually entered on the 4th day of the term following the trial. At the beginning of the 17th century it became customary to allow a motion to be made within these four days to stay the entry of the postea. If the motion was successful a new trial was granted. The court could not however enter a verdict for the other party without a new trial unless there had been a special verdict, and special verdicts were difficult to properly frame. To obviate these difficulties, and to avoid the expense of a new trial, it became the practice for the judge with the consent of the parties to give leave to move the court to enter the verdict for the other side if they considered that his direction to the jury was wrong.[1]

These statutes dealing with trials at nisi prius applied only to cases begun before the Common Pleas or King's Bench. In this, as in other respects, the court of Exchequer was not in the same position as the other Courts of Common Law.[2] Though the barons of the Exchequer could act as judges of assize, and could hear cases at nisi prius, actions brought in the Exchequer could not be heard by the judges of assize unless a special commission were issued for that purpose. 2, 3 Vict. c. 22 enabled the judges of assize to try cases and to take inquisitions of pleas pending in the court of Exchequer of Pleas without the issue of a special commission.

The following commissions empowered the judges of assize to take criminal business:—

(*a*) The commission of Trailbaston.[3] This was a commission issued to certain persons directing enquiry as to persons who disturb the peace, who maintain malefactors, and who pervert the course of justice by illtreating jurors. It is supposed to date from the statute of Rageman (1276). It is in fact in the nature of a general commission of oyer and terminer, i.e. a commission to hear and determine certain crimes and trespasses. But it was something more than this, as apparently these justices entertained suits between party and party.[4] Mr Pike considers that[5] "the court of the justices of Trailbaston was . . . a connecting link between the ordinary courts of justices of oyer and terminer and the court

[1] East Rly. Co. v. Smitherman, cited Thayer, Evidence 241 n. 1; Dublin Rly. Co. v. Slattery (1878) L.R. 3 A.C. 1155, 1204. [2] Above 102, 103.

[3] Coke, 4th Instit. 186; Foss, Judges iii 28-36. The term seems to have been a popular one. It applied originally to the offenders—persons carrying sticks. In 1307 we meet the expression, "Pleas of trailbaston" in two writs, Y.B. 14, 15 Edward III. (R. S.) xxxvi-xlii.

[4] Y.B. 14, 15 Edward III. (R.S.) xxxvi. [5] Ibid.

of the justices in eyre . . . The ordinary functions of a court of oyer and terminer . . . were to hear and determine particular offences and trespasses. The court of Trailbaston seems to have had in addition some sort of general jurisdiction in actions between party and party . . . though there is nothing to show that this jurisdiction extended beyond cases of trespass." On the one hand they are sometimes classed with the justices in eyre, being mentioned by Parliament in the petitions which are directed against the justices in eyre.[1] On the other hand they are classed by Coke with commissions of oyer and terminer.[2] In Coke's time they had long ceased to exist.[3] Their historical importance is that indicated by Mr Pike. They are the connecting link between the justices in eyre and the justices of oyer and terminer.

(*b*) The commission of oyer and terminer.[4] This was a commission addressed to certain judges and others directing them, or any two or three of them[5] "ad inquirendum," concerning certain crimes committed in certain counties, "eaque omnia audiendum et terminandum"; it was usually specially directed that one of the judges must always be present at the proceedings.[6] These commissions are either general or special. They were general when the persons named in the commission were directed to try all cases occurring within certain places. They were special if they were limited to the trial of particular offences.[7] From the Parliament rolls it would appear that in the 14th century great injustice was done by the grant of these special commissions at the suit of individuals.[8] We shall see that this abuse did not cease till the practice of granting

[1] 2 Rot. Parl. 305 no. 21, "q'il ne grante en nulle partie du Roialme Eire ne Trailbaston durante la guerre . . . fors en horrible cas"; 3 Rot. Parl. 24, no. 101; Y.B. 2 Ed. III. (quoted Y.B. 14, 15 Ed. III. (R.S.) xxxvi), they were said to be in a certain case "come Justices in Eire"; Coke, 2nd Instit. 540 said, "they in the end had such authority as justices in eyre."

[2] 4th Instit. 186.

[3] 2nd Instit. 540. This is ascribed to the fact that writs of error lay from them to the King's Bench.

[4] App. XXIII, C.

[5] It was said by Cockburn, C.J., in Leverson v. Reg. (L.R. 4 Q.B. 394, 403), that the trials invarably took place before a single judge. This was justified on the ground that the whole body of persons named in the commission were the court and that the sitting judge represented the court. Thus even if the trial took place before a king's counsel or serjeant the record represented it as taking place before the judges of the superior courts and the "other justices their fellows."

[6] The form runs, "Sciatis quod assignavimus vos et tres vestrum, *quorum* aliquem vestrum nos præfatos (names of the judges) unum esse volumus . . ." Hence the professional judges are said to be of the "quorum." We shall meet this expression again in dealing with the justices of the peace.

[7] Coke, 4th Instit. 163; Hale, 2 P.C. 10-31.

[8] Stephen, H.C.L. i 107-110.

these commissions always to the justices of assize became fixed.

(*c*) The commission of gaol delivery.[1] This was the narrowest of all these commissions.[2] It was addressed to certain judges and others directing them to deliver the gaol of a certain place and try the prisoners therein. In Edward I.'s time a judge was often not on the commission; in fact in 1292 the justices of oyer and terminer were directed to enquire into the misdeeds of the judges of gaol delivery.[3] In later times the differences between these last two commissions became very slight.[4] In fact there was not as a rule much practical reason for distinguishing them, because, as we shall see, both commissions were really executed by the same persons.

In some instances criminal cases may be tried at nisi prius. If a man were indicted in the country, and the indictment were removed by writ of certiorari into the King's Bench, the case might be sent to be tried before the justices of assize as a nisi prius record.[5]

In addition to these commissions, the justices of assize, together with the judges of the court of King's Bench, were also justices of the peace.[6] This does not, however, materially add to their powers. As we shall see, the justices of the peace have a different history.

(2) We must now deal with the process by which the courts held by the justices of assize became regularly defined courts.

The commissions of gaol delivery and oyer and terminer were often directed to persons of weight and influence in the county, whether or no they were lawyers. We have seen that this system led to great abuses. It is clear from the Parliament rolls that such commissions were granted for special cases on the application of some favoured individual.[7] The grant of these commissions to leading men in the county, as well as to the judges, is a survival of the old state of things. But in later times there was always a proviso that the judge named should be of the quorum.[8]

On the other hand the commissions issued for the purpose of civil business must always have demanded the presence of

[1] App. XXIII, D.
[2] P. and M. i 179; ii 642.
[3] 1 Rot. Parl. 86 no. 30.
[4] Stephen, H.C.L. i 106, 107.
[5] Hale, 2 P. C. 39-41; 6 Henry VIII. c. 6.
[6] Bl. Comm. i 338; Stephen, H.C.L. i 112 n. 2.
[7] Stephen, H.C.L. i. 107-110; 27 Edward I. Stat. 1 c. 3; 2 Edward III. c. 2; Reeves, H.E.L. ii 82, 304.
[8] Above 119 n. 6.

a lawyer. It is true that both Magna Carta, and the statutes establishing the jurisdiction at nisi prius, contemplate the presence also of knights of the shire.[1] But a justice of one of the Common Law Courts was always on the Bench to decide points of law. It was only the more difficult points of law which were to be adjourned to the Bench. Thus it happened that the justices of assize and the judges commissioned to try cases at nisi prius would usually be the same persons.

It is only natural that Parliament should consider that the abuses attending the irregular issue of the commissions of oyer and terminer and gaol delivery would best be met by providing that these commissions should be entrusted to the justices of assize.[2] They were trained lawyers. They already travelled round the country to take the assizes. Thus 27 Edward I. Stat. 1 c. 3 provides that these justices shall be also justices of gaol delivery. 2 Edward III. c. 2 recites that, contrary to the former statute, commissions of gaol delivery and oyer and terminer have been procured by great men, and enacts that "The Oyers and Terminers shall not be granted but before justices of the one Bench or the other." In this way, therefore, the justices of assize attracted to themselves the jurisdiction given by these commissions; and, for this reason, the justice of assize possessed a jurisdiction, but little inferior to that of the courts of Common Pleas and King's Bench. Although, therefore, certain of these commissions continued to be issued to laymen, it was the lawyers who really did the work, because without them the laymen could not act. These lawyers were the judges of the Common Law Courts, assisted sometimes by the serjeants, and later by King's Counsel.[3] The inclusion of others—either officers of the court or county magnates—was mere form. The professional class had ousted the amateurs; and a regular and consistent administration of justice throughout the kingdom was thereby secured. We shall see when we come to speak of the justices of the peace that an exactly opposite process took place.[4]

[1] 9 Henry III. c. 12; 13 Ed. I. Stat. 1 c. 30; 27 Ed. I. Stat. 1 c. 4; 14 Ed. III. Stat. 1 c. 16.

[2] Reeves ii 82, 86, 87, 188, 301. The statute 14 Ed. III. Stat. 1 c. 16 speaks as if the justices of assize were, or might be, different persons from the justices of either Bench who travelled round the country to take cases at nisi prius. Possibly even then the wording was a little archaic.

[3] See Leverson v. Reg. L.R. 4 Q.B. 394, 405. It was said that it was the invariable practice that no layman took part in the judicial proceedings. The advantages of this were pointed out by Hale, Common Law (6th Ed.) 340, 341.

[4] Below 127.

The justices of assize acted on circuit not *qua* judges of the Common Law Courts, but *qua* commissioners temporarily commissioned. But as these commissions were regularly issued, they formed courts as permanent as the Courts of Common Law. An act of Edward VI.'s[1] reign provided that prisoners found guilty before a justice acting under one commission, could be sentenced by a justice acting under another; and that actions begun before justices acting under one commission, might be continued by justices acting under a new commission.

Upon the proceedings of courts held by the justices of assize proceedings in error could be taken in the same way as they could be taken upon the proceedings of the Common Law Courts.[2] Thus in criminal cases a writ of error lay for errors upon the record, or the judge might reserve a point for the consideration of the Court of Crown Cases Reserved. In civil cases it had been from the earliest times provided that cases of difficulty should be heard by the courts at Westminister;[3] and in all cases the judgment had originally been given by those courts.[4] In Edward III.'s time the justices of assize were allowed themselves to give judgment.[5] A writ of error lay upon the proceedings before them, or a Bill of Exceptions[6] could be had; and the exceptions, or the alleged errors, would be discussed by the court of error from the court from which the nisi prius record issued.[7] In the 17th century, a motion could be made before the court in banc for a new trial.

Thus the judges of the Courts of Common Law either as judges at Westminster, or as commissioners of assize, practically did the judicial work of the country. In the case of London and the county of Middlesex some special arrangements were needed.

(1) As to civil cases. The court of King's Bench supersedes all special commissions in any county in which it happens to be sitting. It usually sat in Middlesex. Therefore for a

[1] 1 Edward VI. c. 7 § 5; Reeves, H.E.L. iii 473, 474.
[2] Above 85-87, 90-92.
[3] 9 Henry III. c. 12.
[4] 13 Edward I. Stat. 1 c. 30 § 2; 2 Edward III. c. 16.
[5] This was allowed in certain cases by 12 Edward II. Stat. 1 c. 4; in all cases by 14 Edward III. Stat. 1 c. 16 § 13.
[6] Above 91, 92.
[7] Willes, J., in Ex parte Fernandez 10 C.B.N.S. at p. 45 said, "It is familiar learning, that upon a bill of exceptions tendered at the assizes or at nisi prius in town, judgment is entered as a matter of course in the court from which the record comes, according to the opinion expressed at nisi prius, and the exceptions can only be discussed in the court of error from that court, in like manner as if they were exceptions to the opinion of the court in banc upon a trial at bar."

long time after other civil cases were usually tried by a judge at nisi prius, Middlesex cases were tried at the bar of the court of King's Bench. The same rule also held in the case of actions begun in the other Common Law Courts. Great delay to the business of the court was thereby occasioned. It was therefore enacted in 1576[1] that such cases should be tried at nisi prius by any of the judges of the three Courts of Common Law.

(2) As to criminal cases. London was by charter a county. The Lord Mayor, the Recorder, and the Aldermen were entitled to be put upon all commissions of gaol delivery, and oyer and terminer for the City of London. In practice they tried Middlesex prisoners also.[2] In 1834 the Central Criminal Court was established.[3] The judges of the Courts of Common Law, the Lord Mayor, Aldermen, Recorder and certain other city officials, the Lord Chancellor and certain others, or any two of them were made the judges of the court. It was provided that the crown could issue commissions of oyer and terminer and gaol delivery to the judges of the court to try criminal cases arising in the City of London, the county of Middlesex, and certain parts of the counties of Essex, Kent, and Surrey.

III. The Justices of the Peace.

In the Courts of Common Law and the courts held by the Itinerant Justices was vested almost all the common law jurisdiction of the country, civil and criminal. Royal justice had won a complete victory over the older local courts, communal, feudal, or franchise. But there was still left to the old courts and the old officials—to the hundred, the tourn and the sheriff—certain police duties and a criminal jurisdiction over small offences. Even these duties were inadequately fulfilled mainly because the organization and procedure of these courts were antiquated. Royal justice won its final victory when, in the 14th and 15th centuries, it practically absorbed this last remnant of their jurisdiction.

We have seen that justices specially commissioned by the crown had introduced all over the country the newer remedies and the more effective procedure of the Courts of Common Law. The same device was used to reform the

[1] 18 Elizabeth c. 12; Reeves, H.E.L. iii 667, 668.

[2] Stephen, H.C.L. i. 118. In 1753 they tried to modify a sentence proposed by Willes, C.J. His sentence was only carried by a majority, Campbell, Lives of the Chief Justices ii 277.

[3] 4, 5 Will. IV. c. 36. See Leverson v. Reg, L.R. 4. Q.B. 394. It is a superior court against which no mandamus will lie, The Queen v. the Justices of the Central Criminal Court, L.R. 11 Q.B.D. 479.

police system and the petty criminal jurisdiction of the older courts. They too were supplanted by persons specially commissioned by the crown who came to be called the Justices of the Peace. Successive statutes added to their duties, and made them in time the rulers of the county. They were efficient rulers; for, in the 17th century, Coke could say of their rule "it is such a form of subordinate government for the tranquillity and quiet of the realm, as no part of the Christian world hath the like."[1]

To give a full account of the office of the Justice of the Peace would here be out of place. "Long ago," says Professor Maitland, "lawyers abandoned all hope of describing the duties of a justice in any methodic fashion, and the alphabet has become the one possible connecting thread."[2] All that can here be attempted is to sketch their position, and their jurisdiction in relation to the judicial system of the country. We shall therefore give some account of (1) the rise and general importance of the justice of the peace; (2) the courts held by the justices of the peace; (3) their powers in relation to the apprehension of criminals, and the conduct of the preliminary enquiry in criminal cases; (4) their relation to the Courts of Common Law.

(1) The rise and general importance of the justice of the peace.

We have seen that in Henry II.'s reign the sheriff was the ruler of the county, but that even at that early date the crown viewed his power with suspicion. The coroner was placed by his side as a check upon him. But the coroner's office became as we have seen elective; and his efficiency as a guardian of royal interests therefore declined.[3] It was seen that justices acting under direct commission from the crown were alone capable of effectually controlling the local government. An extension of the principle of appointment by direct royal commission gives us the justices of the peace.

In Edward I.'s reign the law which governed the preservation of the peace was the statute of Winchester.[4] That statute mentions justices who were assigned to present to Parliament those who had infringed its provisions.[5] But in this and the following reign its enforcement was left mainly to the sheriff and his officers, assisted by the commissioners of oyer and terminer, gaol delivery, and trailbaston.[6] We meet a new class of officials specially entrusted with the con-

[1] 4th Instit. 170.
[2] Justice and Police 84.
[3] Above 44-47.
[4] 13 Edward I. St. 2.
[5] Cap. 6 § 13.
[6] Above 118-120; Reeves, H.E.L. ii 328.

servation of the peace in 1327.[1] Their powers were enlarged in 1330.[2] In that year they were allowed to receive indictments, and to send those indicted for trial to the justices of gaol delivery. The sheriff and his officers were directed not to let such persons out on mainprize if not by law mainpernable. Those assigned to keep the peace could punish sheriffs or their officers if they infringed the statute. In 1344[3] those assigned to keep the peace together with "other wise and learned in the law" were empowered to hear and determine felonies and trespasses. This expedient was so successful that the commons recommended its further application.[4] The recommendation was followed. Persons were assigned not merely to keep the peace, but to see to the due observance of certain specified statutes.[5] They were directed in 1352[6] to hold their sessions four times a year; and in 1360[7] there were assigned in every county in England, "one lord and with him three or four of the most worthy in the county, with some learned in the law," to keep the peace, to arrest and imprison offenders, to imprison or take surety of suspected persons, and to hear and determine felonies and trespasses done in the county. From about this time they are styled justices of the peace—a change in their title which denotes an increase in their judicial powers.[8] From this time onwards their duties—police, judicial, and administrative—were continually added to by the legislature. Lambard wrote his treatise on the justice of the peace in James I.'s reign. He says that Hussey, who was Chief Justice in 1485, "did thinke that it was enough to loade all the justices of the peace of those days with the execution onely of the statutes of Winchester and Westminster for robberies and felonies; the statute of forcible entries; the statute of labourers, vagabonds, livery, maintenance, embracery, and sheriffs"; and he asks, "how many justices thinke you may now suffice (without breaking their backs) to beare so many, not loads, but stacks of statutes that have since that time been laid upon them."[9]

The number of the justices for each county and their qualifications have varied at different periods.

12 Richard II. c. 10 fixed the number at six besides the

[1] 1 Edward III. St. 2. c. 16.
[2] 4 Edward III. c. 2.
[3] 18 Edward III. St. 2 c. 2.
[4] Reeves, H.E.L. ii 330.
[5] Lambard, Eirenarcha, Bk. I. c. 9.
[6] 25 Edward III. St. 1 c. 7.
[7] 34 Edward III. c. 1.
[8] Before that time they were merely conservators of the peace (Lambard, Bk. I. c 4). They are called justices in 1362 (36 Edward III., St. 1 c. 12). As to conservators of the peace see Lord Camden in Entick v. Carrington, 19 S.T. at p. 1061 Bl. Comm. i 338, 339.
[9] Bk. I. c. 7.

justices of assize. Two years later it was raised to eight.[1] But with the multiplication of their duties their numbers increased. No certain number is in fact fixed.[2] As to their qualification 13 Richard II. St. 1 c. 7 ordained that they should be the most sufficient knights, esquires, and gentlemen of the land. A statute of Henry V.'s reign enacted that they should be resident in their counties. A statute of Henry VI.'s reign enacted that they should have land to the value of £20 a year—a property qualification which was raised in George II.'s reign to £100 a year.[3] On entering office they took an oath to duly perform their duties.[4]

They were appointed by the crown; and their authority originally depended upon the terms of their commission. But, as succeeding statutes added to their duties, this commission became exceedingly confused, on account, as Lambard says, of "the untoward huddling of things together which were at strife the one with the other."[5] In 1590 Sir Christopher Wray, the Lord Chief Justice of the King's Bench, in conference with the other judges, "carefully refined" the commission.[6] The modern commission substantially follows this form. But the duties of the justice have long depended rather upon modern statutes than upon its archaic wording.[7] The commission in substance states[8] (1) that certain persons have been assigned in a certain county to keep the peace; (2) that they have been assigned to enquire into certain specified offences, with a proviso that difficult cases are to be reserved for the judges of assize; and that at certain times they shall enquire into, hear, and determine

[1] Reeves, H.E.L. ii 485.

[2] Bl. Comm. i 340, 341.

[3] Ibid, and Reeves, H.E.L. ii 525.

[4] Lambard, Bk. I. c. 10 gives the following version of the oath of the justices:—

"Doe equall right to rich and poor,
as wit and law extends:
Give none advice in any cause,
that you before depends:
Your Sessions hold as statutes bid:
the forfeits that befall
See entered well, and then estreat
them to the Chequer all:
Receive no fee, but that is given
by King, good use, or right:
Ne precept send to party self,
but to indifferent wight."

[5] Bk. I. c. 9.

[6] Ibid, and Coke, 4th Instit. 171; App. XXIV.

[7] Maitland, Justice and Police 84. Referring to the discretion given them by such statutes Lambard warns them that they are "lex loquens"; and that they should not "play the Chancellor" in every case which comes before them.

[8] App. XXIV.

these matters, (3) that a certain person has been appointed "Custos Rotulorum" i.e. "keeper of the rolls of our peace" in the county.[1]

The second clause runs, "assignavimus etiam vos et quolibet duos vel plures vestrum (*Quorum aliquem vestrum A, B, C, D, etc., unum esse volumus*) justitiarios nostros ad enquirendum, etc." The intention was that only those justices learned in the law should be of the quorum.[2] But the practice sprang up of making all the justices members of the quorum.[3] The necessary legal knowledge can be supplied by the clerk to the justices, who is appointed by the custos rotulorum. Thus, in the case of the justices of the peace, the clause constituting the quorum came to have an effect very different to that which a similar clause had in the case of the justices of assize. We have seen that in the case of the justices of assize its effect was to vest the jurisdiction conferred by the commission in the professional lawyers.[4] In the case of the justices of the peace it came to have no effect at all. In fact, for the miscellaneous governmental and judicial duties which devolved upon the justices of the peace, a professional lawyer was not needed. The duties were done by the country gentry; and the office of justice of the peace became an excellent training for the knight of the shire.

The justices of the peace may in theory be dismissed at the pleasure of the crown. The crown has never, except in the 17th century,[5] exercised this power unless there has been some gross case of misconduct. Thus the country gentlemen were the permanent rulers of the county; and this has given the English constitution "a foundation upon which the conduct of the highest state business could be left to changing cabinets."[6] Recent changes have divided the duties of the justice of the peace, and have placed the greater part of their administrative duties in the hands of elected boards. But they still retain their judicial powers, and some small remnant of those administrative powers which gave them in the 17th and 18th centuries the entire control of the local government.[7]

(2) The courts held by the justices of the peace.

[1] This office has come to be united with that of Lord Lieutenant of the county, Maitland, Justice and Police 82. [2] Lambard, Bk. I. c. 9.

[3] In Blackstone's time it was customary to omit one for form's sake, Comm. i 340. 26 Geo. II. c. 27 enacted that a warrant should stand though it was not expressed in it that the justice who issued it was of the quorum. [4] Above 119 n. 6, 121.

[5] 1626 Charles I. had recourse to this measure in view of his levy of tonnage and poundage without Parliamentary sanction, Gardiner, History of England vi 125, 126. [6] Gneist, History of English Constitution ii 372.

[7] 51, 52 Vict. c. 41.

There are two main classes of courts held by the justices of the peace—(i) the courts of quarter or general sessions; (ii) the petty sessions.

(i) The courts of Quarter or General Sessions:—

(*a*) In the country.

The courts of quarter sessions for the whole county are held four times a year at times prescribed by statute.[1] At times other than those fixed by statute courts of general sessions can be held. In addition to a large jurisdiction and many administrative functions conferred upon the court by numerous statutes, it possesses a wide criminal jurisdiction. This jurisdiction extends nominally to all crimes except treason, subject to the proviso that cases of difficulty must be sent to the assizes. During the 18th century the custom sprang up of always sending to the assizes cases which might be capitally punished. Capital cases under the old law were numerous. It was thus, as Stephen points out, an indirect effect of the old law as to capital punishment, that it narrowed the power of the quarter sessions.[2] In 1842 it was enacted that over treason, murder, felony punishable on a first conviction with penal servitude for life, and certain other specified offences, the quarter sessions should have no jurisdiction.[3] It possesses also an appellate jurisdiction from the petty sessions where such a right has been given by statute.[4]

(*b*) In towns.

The courts of quarter and general sessions for the county have jurisdiction over any towns in the county unless the town has a separate court of quarter sessions. In the case of large towns the number of cases to be dealt with is more than an unpaid body[5] of justices can manage. It is for this reason that many towns have at the present day separate courts of quarter sessions.

London is by charter a county. The Mayor, the recorder, and aldermen held courts of quarter sessions for the city of London, and the borough of Southwark.[6] In 1844 it was provided that quarter or general sessions should be held for

[1] 36 Edward III. c. 12; 2 Henry V. St. 1 c. 4; 11 Geo. IV., 1 Will. IV. c. 70 § 35; 57, 58 Vict. c. 6.

[2] H.C.L. i 114, 115.

[3] 5, 6 Vict. c. 38.

[4] Harris, Criminal Law (Ed. 1899) 491.

[5] They were originally allowed 4s. a day during the time when the sessions lasted. But, as by a statute of Richard II.'s reign, the number was fixed at 8, it was thought that only 8 were entitled to the money. Lambard says (Bk. IV. c. 21) that the whole allowance was sometimes spent in "defraying their common diet." These payments became as obsolete as those made originally to the knights of the shire.

[6] Stephen, H.C.L. i 118.

Middlesex twice a month, and that they should be presided over by a paid assistant judge.[1]

Up to 1835[2] the constitution and powers of the courts in the other towns depended upon the Charter of the individual town. In that year was passed the Municipal Corporations Act. According to that act certain towns were allowed to apply to the crown for grant of a separate court of quarter sessions. This court, if granted, is presided over by a recorder who is the sole judge of the court. The recorder is appointed by the crown from among barristers of five years' standing. Towns which have not thus acquired a separate court of quarter sessions lose their criminal jurisdiction. Since 1835 several new towns—such as Manchester and Birmingham—have acquired separate courts of quarter sessions.[3] In 1882 a new Municipal Corporations Act consolidated the existing law on the subject.[4]

It does not always follow that, because a town has a recorder and a separate court of quarter sessions, the jurisdiction of the county justices is excluded. This depends upon the question whether they were so excluded before the passing of the Municipal Corporations Act of 1835. This can only be ascertained from the old charters of the particular town.[5]

(ii) The Petty Sessions.

The numerous statutes which conferred jurisdiction upon justices of the peace, often gave to two or more justices the power to inflict penalties for the breach of those statutes. These acts, however, usually left the form and manner of administering this summary jurisdiction entirely unprovided for. Many difficult questions were thereby caused. Some of them were dealt with by means of writs of certiorari obtained from the court of King's Bench in order to quash convictions before the justices.[6] In 1848[7] an act was passed which codified the law as to the procedure to be observed by the justices in the exercise of their summary jurisdiction. The name "petty sessions" was not given to those sessions of the justices till a little later. It first occurs in the statute book in 1849.[8] Since that date the powers of the petty

[1] 7, 8 Vict. c. 71; 22, 23 Vict. c. 4.
[2] 5, 6 Will. IV. c. 76.
[3] Stephen, H.C.L. i 117, 118.
[4] 45, 46 Vict. c. 50 Part viii.
[5] 45, 46 Vict. c. 50 § 154. The result is that the question whether the county justices are excluded depends "rather on past good fortune than on present importance," Maitland, Justice and Police, 97 n. 1.
[6] Stephen, H.C.L. i 122, 123.
[7] 11, 12 Vict. c. 43.
[8] 12, 13 Vict. c. 18 mentions in the preamble "certain meetings of the justices called petty sessions."

sessions to deal with crime, either on account of the petty nature of the crime, or on account of the youth of the offender have been considerably enlarged.[1]

The causes which led to the creation for the more important towns of separate courts of quarter sessions staffed by professional judges, operated even more strongly in the case of the summary jurisdiction of the justices. Many towns before 1835 had separate commissions of the peace. But the mass of petty offences arising in a large town were clearly beyond the capacity of amateur justices. The evil was more clearly seen in London than in any other town on account of its size. In London there arose a class of "trading justices" who did the work of justices for the fees which they were able to extort. The effect is well illustrated by the evidence of a witness before a committee of the House of Commons in 1816.[2] He said, "it was a trading business; and there was Justice This, and Justice That. Justice Welch in Litchfield Street was a great man in those days, and old Justice Hyde, and Justice Girdler, and Justice Blackborough, a trading justice at Clerkenwell Green, and an old ironmonger. The plan used to be to issue out warrants and take up all the poor devils in the street, and then there was the bailing of them, 2/4, which the magistrates had . . . they sent none to gaol, the bailing them was so much better."

The evil was met in 1792[3] by the establishment of seven public offices. To each of these offices three justices were assigned. They were paid a fixed salary. All the fees were paid to a receiver. They were given the power to appoint a certain number of constables. The experiment proved successful. The number of these public or police offices has been raised to eleven.[4] The justices, now called stipendiary magistrates, must be barristers of seven years' standing. They are all in the commission of the peace for Middlesex, Kent, Surrey, Essex, Hertfordshire. The chief magistrate at Bow Street is also in the commission of the peace for Berkshire.[5]

Other towns have followed the example of London. The Municipal Corporations Act 1835 enacted that certain towns should have a separate commission of the peace. It gave

[1] Stephen, H.C.L. i 124-126; Maitland, Justice and Police, 123-129.

[2] Quoted Stephen, H.C.L. i 231.

[3] 32 Geo. III. c. 53. St Margarets, Westminster; St James, Westminster; St James, Clerkenwell; St Leonard, Shoreditch; St Mary, Whitechapel; St Paul, Shadwell; St Margaret's Hill, Southwark.

[4] The crown may establish 13 with any number of magistrates up to 27.

[5] 2, 3 Vict. c. 71; 11, 12 Vict. c. 42 § 31.

the crown power to appoint stipendiary magistrates for the town, if the town passed a bye-law for that purpose which had been approved by the Secretary of State.[1] In 1863 the Stipendiary Magistrates Act[2] gave the crown power to appoint such magistrates on the application of the Local Board of any place which contained more than 25,000 inhabitants. But though in such towns and districts much of the work of petty sessions is done by trained lawyers, there are still a number of unpaid magistrates. In London the mayor and aldermen, in other towns the mayor and the recorder, are ex officio magistrates; and in such towns the crown can nominate as justices any persons it pleases, provided they are resident within seven miles of the town.[3]

(3) Their powers in relation to the apprehension of criminals and the conduct of the preliminary enquiry in criminal cases.

*The apprehension of criminals.*

Under the older statutes which regulated the preservation of the peace—the Assizes of Clarendon (1166) and Northampton (1176) and the Statute of Winchester (1285)—the duty of apprehending criminals devolved upon the inhabitants at large. The Assize of Arms (1181) and the Statute of Winchester contained provisions which defined the arms which all free men must carry. All were obliged to pursue the criminal when the hue and cry was raised. Neglect of these duties entailed an amercement of the individual, the township or the hundred.[4] The sheriffs and the constables were under special obligations, as conservatores pacis, to fulfil these duties. After the jurisdiction of the justices of the peace was established these duties devolved upon them. But the statutes which defined their powers gave them no further power to apprehend criminals than that possessed by private persons. They might arrest persons actually committing, or who had actually committed a felony; or they might arrest a person if *they themselves* suspected, on reasonable grounds, that a felony had been committed. Lambard states[5] that some justices were accustomed to issue precepts to attach persons suspected *by others* of felony; but that the whole court, 14 Henry VIII., had condemned the practice. The reason assigned is, that if the bailiff who executes the warrant suspects the person he may arrest without warrant. If he had no such suspicion the arrest is illegal. It is true that certain statutes

[1] 5, 6, Will. IV. c. 76 § 99. [2] 26, 27 Vict. c. 97.
[3] Stephen, H.C.L. i 232.
[4] Above 114, 115; Reeves, H.E.L. iii 713-717. [5] Bk. II. c. 6.

of Philip and Mary's reign gave the justices power to examine prisoners brought before them.[1] Coke explains that this simply gave the justices power to issue a warrant to a constable to see the peace kept during the apprehension of the person suspected by the accuser. This warrant is "merely to assist the party that knoweth or hath suspicion of the felony." It gives no right to break open any man's house in order to apprehend the suspected person, "for it is in law the arrest of the party that hath the knowledge or suspicion, who cannot break open any house." In agreement with Lambard he says, "We hold the resolution of the Court, viz., of Brudnel, Pollard, Broke, and Fitzherbert in 14 H. VIII. to be law, that a justice of the peace could not make a warrant to take a man for felony, unless he be indicted thereof, and that must be done in open sessions of the peace."[2]

Nevertheless it is clear both from Coke[3] and Lambard that there was a practice growing up of issuing warrants to arrest suspected persons. Indeed Lambard states some arguments in support of it.[4]

In the 17th and 18th centuries the practice became common. We may see, however, a survival of old ideas in the use of the phrase "to grant a hue and cry" to signify the issue of a warrant.[5] So common, and indeed necessary, had the practice become that Hale[6] defends its legality. "My lord Coke," he says, "in his jurisdiction of courts hath delivered certain tenets, which, if they should hold to be law, would much abridge the power of justices of peace, and give a loose to felons to escape unpunished in most cases." The language of the older statutes is so vague that Hale makes a very plausible argument upon them. His thesis is that the justices may issue a warrant to apprehend a person suspected of felony, "*though the original suspicion be not in himself but in the party that prays his warrant.*"[7] That however is just what the older authorities denied.

Hale's statement of the law for his own day was probably sounder than his history, in this particular point. The power to arrest persons suspected of felony was practically recognised by several statutes of the 18th century.[8] It was

[1] 1, 2 Philip and Mary c. 13; 2, 3 Philip and Mary c. 10; below 133.
[2] 4th Instit. 176-178.
[3] He says, ibid p. 178, "though commonly the houses or cottages of poor and base people be by such warrants searched, yet, if it be lawful, the houses of any subject, be he never so great, may be searched by such warrant upon bare surmises."
[4] Bk. II. c. 6.
[5] Stephen, H.C.L. i 190.
[6] 2 P.C. 107.
[7] Ibid 109, 110.
[8] Stephen, H.C.L. i 190 n. 2.

put upon a clear statutory basis, and the procedure to be followed was regulated in 1848.[1]

*The conduct of the preliminary enquiry in criminal cases.*

Early law did not contemplate any preliminary enquiry into the guilt or innocence of an accused person. Criminals were presented for trial either by the jury of presentment, or in consequence of the finding of a coroner's inquest. If they were taken in the act they were generally executed out of hand.[2]

The coroner's inquest must always have partaken somewhat of the character of a preliminary examination; and we have seen that the powers of the coroner as to taking depositions and binding over witnesses to appear at the trial have been enlarged by statute.[3] Two statutes of Philip and Mary's reign, which conferred similar powers on the justices of the peace, are the origin of this part of their jurisdiction. 1, 2 Philip and Mary c. 13 enacts that prisoners arrested for felony shall not be let to bail or main-prize except by two justices in open sessions. These justices, when the prisoner comes before them, "shall take the examination of the said prisoner and information of them that bring him," and shall put into writing the material evidence against the prisoner before they release him on bail. 2, 3 Philip and Mary, c. 10 enacted that such examination should take place whether or no the prisoner was actually bailed; and that the justices could bind over to appear at the trial any witnesses against the prisoner whose evidence they deemed to be essential.

These statutes were evidently designed to arm the justices with new powers against prisoners. They do not contemplate a strictly judicial enquiry into the facts of the case.[4] In fact we find that in the 17th century the examination conducted by the magistrates was of an inquisitorial nature. The prisoner was closely examined. The witnesses for the prosecution were not examined in his presence. Their

[1] 11, 12 Vict. c. 42. [2] P. and M. ii 577, 578. [3] Above 46.

[4] Hale from this point of view compares the provision of the act 1, 2 P. and M. c. 13, which relate to the J.P. with the provisions of the same act which relate to coroners. "The justices of the peace are to put into writing the information . . . *or so much thereof as shall be material to prove the felony*; but the coroner is to put into writing *the effect of the evidence given to the jury before him being material*, without saying *so much as is material to prove the felony*," 2 P.C. 61. The judges themselves issued the warrants and conducted the preliminary examinations in important cases. Coke in Overbury's case (1616) took 300 examinations, Campbell, Lives of the Chief Justices, i 279, 280. So also Holt, C.J., ibid ii 175, 176. The last instance is that of Parker, C.J., in Anne's reign, Campbell, Chancellors, iv 516.

evidence was only for the information of the court.[1] Even as late as 1823[2] it was stated to the grand jury that, when a magistrate was conducting this preliminary examination, he was acting inquisitorially and not judicially; that such proceedings might and ought to be conducted in secret; and that information so ascertained might be communicated to the prosecutor but not to the party accused. In 1836 the Prisoners' Counsel Act[3] allowed accused persons to inspect all depositions taken against them. In 1849[4] it was enacted that the witnesses for the prosecution should be examined in the presence of the accused. The accused person was allowed to make any statement he pleased, or to call any witnesses he pleased; but he is not obliged to do either; and the magistrate must inform him of this. The preliminary examination before the magistrates is thus made an entirely judicial proceeding.

As a matter of fact the establishment of a system of professional police[5] has, in the 19th century, more clearly differentiated the functions of the magistrate and the policeman. The magistrate can act as a judge now that he is no longer required to supplement the deficiencies of the police force. It is for the same reason that the apprehension of suspected persons by means of warrants can now no longer be regarded with suspicion. In the 17th century the power against which Coke protested, meant the issue of a warrant, and the examination of the prisoner by the detective who was getting up the case. The person so apprehended is now brought before a magistrate who can have no interest in acting other than judicially.

(4) The relation of the justices of the peace to the Courts of Common Law.

The justices of the peace are subjected to the control of the Courts of Common Law by means of the prerogative writs.[6] By means of the writ of certiorari their decisions can always be questioned, unless this right has been taken away by statute. By means of the writ of mandamus they can be ordered to hear a case falling within their jurisdiction.

In former days they were also subject to the control of the court of Star Chamber. Lambard refers to that court as the

[1] For instances see Stephen, H.C.L. i. 221-228. [2] Ibid 227, 228.
[3] 6, 7 Will. IV. c. 114.
[4] 11, 12 Vict. c. 42; Maitland, Justice and Police, 129.
[5] For an account of this see Stephen, H.C.L. i. 194-200; Maitland, Justice and Police, chap. x.
[6] Above 92 seqq.; Gneist, History of the English Constitution, ii 369, 370.

"best guide and direction"[1] a justice can have in dealing with cases of riot. In many cases the Lord Chancellor gave his annual charge to both justices of the peace and justices of assize in the Star Chamber.[2] In many other cases the exercise of their administrative duties was controlled by the Council or the court of Star Chamber.[3] The abolition of the Star Chamber placed them more directly under the control of the Courts of Common Law. But they were still controlled, in respect of certain of their duties, by departments of the Council, represented in modern times by the Local Government Board and the Board of Trade.[4] As we have seen, the Local Government Act of 1888 has transferred most of these administrative duties to the County Councils.

IV. The Jury.

We have described the growth and jurisdiction of the courts which interpret and apply the rules of the common law. We must now deal with the various methods by which the common law has at different periods decided the disputed questions of fact which arise within those courts. This is not the place to attempt to minutely map out the debatable boundary line between law and fact.[5] It is clear that in any legal system the distinction between questions of law and questions of fact is a primary distinction. To apply a fixed rule of law to a given state of facts is one thing. To decide whether one of two alternative states of fact exists, or has existed is another.

The method almost universally employed by the common law to ascertain the truth about disputed facts is the jury. The jury is, as Blackstone terms it, "the principal criterion of truth in the law of England."[6] Hence we get the well-known maxim, "ad quæstionem facti non respondent judices: ad quæstionem juris non respondent juratores." The maxim itself is probably not much older than the 17th century.[7] Taken literally it is not true. Incidental questions of fact forming no part of the issue have always been decided by the court. The maxim refers only to questions actually at issue

[1] Bk. II. c. 5, cf. 4 Henry VII. c. 12; Gneist ii 217, 218.

[2] Les reportes del cases in Camera Stellata (1593-1609) viii, ix, 19, 56, 101, 186, 326, 367. They are directed to look after vagrants, seminaries, forestallers, "the excesse of apparelle" among ladies of various classes, poor law, sheriffs, close time for "yonge things of various kinds."

[3] Hudson 63, 64, 109.

[4] Maitland, Justice and Police, 87.

[5] See Thayer, Evidence, chap. v.

[6] Bl. Comm. iii 348.

[7] Thayer, Evidence, 185 and n. 4. Coke is apparently the earliest authority for the maxim. Vaughan, C.J., in Bushell's case (1670) Vaughan Rep. 149, speaks of the saying as "that Decantatum in our books."

between the parties—not to incidental matters arising before and during the trial. Such questions of fact at issue between the parties the jury "adjudge upon their evidence" and "thereupon give their verdict."[1] The jury so employed is the most distinctive, and, in the opinion of those who have had large experience of its working, the most valuable part of the common law system.[2]

In order to understand its origin and history we must go back to a time when a reasonable adjudication upon disputed facts would have been impossible. More primitive methods decided the facts at issue between litigants. Of these we must take some notice. They lingered on as survivals till a late period in the history of English law. Their chief interest, however, lies in the fact that we must look for the origin of the jury at a period when these ideas were flourishing. The jury was, so to speak, born into an atmosphere permeated with these ideas. It naturally long retained many marks of its ancient origin. The subject will fall into the following divisions :—

1. The older methods of trial.
2. The Jury :—
    i. The origin and the different uses of the jury.
    ii. The growth of the judicial functions of the jury.
    iii. Methods of controlling the jury.
    iv. The legal and political effects of the jury system.

1. The older methods of trial.

In modern times we understand by a trial a process of reasoning from evidence by means of which the truth as to the facts in issue may be elicited. There were no such trials as this in ancient law. The terms applied to the processes used were probatio, purgatio, or defensio. The term triatio does not become common till the 14th century.[3] In fact the parties tried their own cases by processes such as compurgation, ordeal, or battle. The parties themselves, or the court selected the process by which the proof or the defence must be made. This selection by the court has been called the "medial judgment," or the "Beweisurtheil"; and there were

[1] Case of the Chancellor of Oxford (1614) 10 Co. Rep. 56 b; Thayer, Evidence, 189. See Bl. Comm. iii 331-333 for a list of matters determined by the judges by the evidence of their senses.

[2] Below 166-169.

[3] Thayer, Evidence, 16 n. 1. Bracton saw a clear distinction between assisæ, juratæ, and inquisitiones on the one hand, and purgatio or defensio on the other. "Et sciendum quod sunt assisæ sive juratæ sive inquisitiones de transgressionibus et aliis. Item sunt purgationes, ut si crimen imponatur vel delictum, purgatio erit probatio innocentiæ. Item est defensio contra præsumptionem, quæ nec dicitur jurata sive inquisitio nec purgatio, scilicet ubi quis dicit aliquid esse et inde producit sectam, exinde sequitur probatio contra sectam," f. 290 b.

many technical rules upon which the selection depended.[1] Each process had its rules, and they must be rigidly followed —"qui cadit a syllaba cadit a tota causa." The judges were umpires who saw to their observance. The person who successfully carried through the process established his view of the facts and won his case. Professor Maitland by an apt comparison clearly shows the difference between these primitive methods of proof and defence and the modern trial. "The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these is the conduct of the man of science who is making researches, and will use all appropriate methods for the solution of problems, and the discovery of truth. At the other stands the umpire of our English games who is there . . . merely to see that the rules of the game are observed. . . . The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that'".[2] These different processes for ascertaining facts are really so many games, each with their own rules; and the facts are, as the result of the game decides.

To make a recourse to one of these processes necessary there must as a rule be more than merely the plaintiff's assertion. The plaintiff must usually produce a "secta,"[3] i.e. witnesses. They are witnesses not to the facts, but to the genuineness of the cause of complaint. Magna Carta provided that "nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis."[4] This, as a year book of 32, 33 Edward I. explains, means that a defendant cannot be compelled to defend himself by law wager, or compurgation, unless the plaintiff produces a sufficient secta.[5] It was only in cases which were obvious, as when the thief was taken with the "mainour," and this is produced in court, or in cases where the plaintiff had other evidences as to the genuineness of his cause of action, such as documents, that the secta was not required. With the growth of other conceptions of a trial the secta became a mere form.[6]

[1] Bigelow, Procedure, chap. viii; Thayer, Evidence, 9.
[2] P. and M. ii 667. [3] Reeves, H.E.L. i 381, 382. [4] c. 38.
[5] Y.B. 32, 32 Edward I. (R.S.) 516, quoted Thayer, Evidence, 11 n. 2; Reeves, H.E.L. ii 155, 156.
[6] In Bracton's day it was no proof of the facts alleged. He is explaining the ways in which an exceptio can be proved, and says, "item non per sectam, quæ fieri poterit per domesticos et familiares, secta enim probationem non facit, sed levem inducit præsumptionem, et vincitur per probationem in contrarium, et per defensionem per legem," f. 400 b.

It was clearly decided in Edward III.'s reign that they could not be examined, and need not be produced;[1] but if they did not exist the action was lost.[2] Till 1852 the plaintiff's declaration always concluded with the words, "et inde producit sectam."[3]

When the plaintiff has properly alleged his cause of action the defendant will be able to meet it in several ways according as he chooses, or as the court by its medial judgment may determine. The following were the chief ways known to English law:—

(i) *Compurgation* or *Law Wager*.[4]

If the defendant will deny the charge on oath in a set form of words,[5] and can get a certain number of other persons (compurgators) to back his denial with their oaths, he wins the case. If he cannot get the required number, or they do not swear rightly according to the set form, "the oath bursts," and he loses.[6]

The belief in the sanctity of an oath was common to Roman law and to the various codes of the barbarians who overran the Roman empire. But this institution of compurgators was not known to Roman law.[7] In primitive times the compurgators may all have been of the defendant's family, or of the same guild or frithborg with himself. The church adopted the institution; and with their fellow-ecclesiastics for compurgators they found it a useful weapon.[8]

The number of compurgators varied according to the circumstances. In the manorial courts we find 2 or 5 compurgators. Fleta states that they should be double the number of secta.[9] Later practice fixed the number at 12.[10] According to the older formulas the compurgators took the same oath as their principal. They were liable like him to the penalties of perjury.[11]

When we meet with compurgation in Henry II.'s time it is beginning to decline. The study of Roman law was beginning to introduce the more modern idea of a trial.[12] Canon law

[1] Thayer, Evidence, 15. See Y.B. 13, 14 Edward III. lii, liii.
[2] Ibid; P. and M. ii 213 n. 1.
[3] Stephen, Pleading (Ed. 1827) 370; 15, 16 Vict. c. 76 § 49.
[4] Thayer, Evidence, 24-34; Lea, Superstition and Force, Essay I.; P. and M. ii 631-634; Bl. Comm. iii 341-348. [5] For these forms see Lea 58.
[6] P. and M. ii 599. [7] Lea 34. [8] Ibid. 35.
[9] II. 63, 10. [10] Co. Litt. 295; Bl. Comm. iii 343. [11] Lea 64, 65.
[12] Ibid 72-74. "The criminal procedure of the barbarians had rested . . . on the system of negative proofs. In the absence of positive evidence of guilt . . . the accused was bound to clear himself by compurgation or by the ordeal." The

was beginning to look with disfavour on a system which was a direct incentive to perjury. Under its influence compurgators swore, not to the defendant's case, but to their belief in its truth.[1] In England the jealousy between the temporal and ecclesiastical courts prevented any efficient punishment for perjury.[2] According to the assize of Clarendon, those who were of bad character, though they had successfully waged their law, were compelled to depart over the sea within eight days.[3] The assizes took its place in real actions, except in the case of incidental questions arising in these actions, e.g. as to whether the defendant has been duly summoned.[4] It was not allowed where the crown was a party. This excluded it from criminal cases; and from the court of Exchequer, where directly or indirectly the crown always was a party. In no cases was it allowed where trespass, deceit or any forcible injury was alleged.[5]

Though the royal courts narrowed its scope it still held its ground. It is most frequently used in the manorial courts.[6] It was valued by the towns as an alternative to trial by battle. This is clear from the fact that it constantly appears in the charters of London.[7] It still held its ground in the king's courts in certain actions of debt, detinue, and account.[8] There are many decisions as to when it will be allowed in these actions and when it will not.[9] The principle of these cases is most clearly stated by Mr Pike.[10] He says "they were cases in which the plaintiff or demandant made the allegation without any other proof than his suit, and in which the defendant or tenant, being the only person affected, denied it. It was for this reason that the wager of law was allowed in actions of debt without specialty, and in some actions of detinue. The truth of the matter was or might be known only to the parties, the word of each of whom was as good as that of another. If two persons were alone, and one lent the other some money, it is obvious that these two persons alone would know the facts. If the defendant could find

Roman system threw the onus of proof on the accuser. The early Common law followed the older principle: thus Fleta II. 63, 11 says that in actions for debt "semper incumbit probatio neganti" (quoted Lea 74 n. 1).

[1] Lea 71, 72. Innocent III. made this a general rule.
[2] P. and M. ii 541.
[3] § 14.
[4] Y.B. 16 Ed. III. (ii) (R.S.) xix, xx.
[5] Bl. Comm. iii 346, 347.
[6] Select Pleas in Manorial Courts; the Court Baron (S.S.).
[7] P. aud M. ii 632; Thayer, Evidence, 25, 27, 28.
[8] Thayer, Evidence, 29; Reeves, H.E.L. ii 400, 401, 611-615.
[9] Co. Litt. 295; Bl. Comm iii 345, 346.
[10] Y.B. 16 Edward III. (ii) (R.S.) xviii, xix.

eleven persons to swear that they believed in his veracity, there might be some presumption that he was of a truthful character, and ought to be believed on his oath." It held its ground also in the Ecclesiastical Courts.[1]

In practice its scope was very limited. It would not lie in an action of debt if the foundation of the action was the defendant's wrong.[2] As early as the 17th century the actions of trover and assumpsit (in which it was not allowed) were taking the place of detinue and debt.[3] Instead of actions of account recourse was usually had to bills in equity.[4] As Blackstone put it, it was out of use but not out of force.[5] In 1708,[6] 1799,[6] and 1824 defendants successfully met claims made against them by producing compurgators. The case of *King* v. *Williams*[7] in 1824 was the last instance of its use. In 1833 the wager of law was finally abolished.[8]

(ii) *Battle.*[9]

Trial by battle is almost universally found among the barbarian tribes from whom the nations of modern Europe trace their descent. It is not merely an appeal to physical force because it is accompanied by a belief that Providence will give the victory to the right. Christianity merely transferred this appeal from the heathen deities to the God of Battles. The trial by battle is the *judicium Dei* par excellence.

The Anglo-Saxons seem to have been almost the only nation who did not possess it. It appears in England as a Norman novelty.[10] But when it appears it was used here as abroad to settle a large variety of disputed questions. Witnesses called by the adverse party, and even one's own witnesses, if they appeared to be adverse, might be compelled to defend their veracity by the battle.[11] A court might

[1] There it became a farce, see P. and M. ii 541.

[2] London v. Wood (1701) 12 Mod. 669.

[3] In 1587 Manwood, C.B., said that it was the plaintiff's own fault if he lost his case by the defendant's wager of law, because he might have brought assumpsit and not debt, and then there would have been no wager of law, cited Thayer, Evidence, 30, 31.

[4] Bl. Comm. iii 348.

[5] In his time it was still usual, where a statute imposed a penalty to be recovered by action of debt, to provide that no wager of law should be allowed (ibid).

[6] Lea 86.

[7] 2 B. and C. 538.

[8] 3, 4 Will. IV. c. 42 § 13.

[9] Neilson, Trial by Combat; Lea, Superstition and Force, Essay II.; Thayer, Evidence, 39-46; P. and M. ii 597, 630, 631.

[10] Lea 115. Thayer, Evidence, at p. 41 points out that it was therefore unpopular, that a large scope was given to the ordeal, and that when that was abolished there was an "unusually wide gap" to be filled by the new method of trial by jury.

[11] Bracton f. 151, "cum autem warrantus presens fuerit, aut statim warrantizat, aut defendat quod ei warrantizare non debet, et negat. Et quo casu, si negaverit,

be compelled to defend its judgment in this manner.[1] A man could in this way prove his innocence of crime, his right to property, or right to obtain payment of a debt.[2] It was used not merely in the ordinary litigation of private persons, but also in international controversies. When the kings of Castile and Navarre refered their claims to Henry II., each side was accompanied by champions to settle in the usual way any incidental points which might arise. "A duellist in fact seems to have been reckoned a necessary adjunct to diplomacy."[3]

Thus in early law to begin a law suit, or even to be a witness in a law suit when the other side was skilled in war-like weapons, was a perilous process. It was only certain classes, such as infants, women, or those over sixty years of age who could decline the battle.[4] They might employ champions. Soon the power to appoint champions became extended to able-bodied litigants. It is clear that "the use of a professional gladiator is inconsistent with a pious reference to the judgment of God."[5] In England the champion was a witness; and if it could be proved that he was perjuring himself he was liable to lose a hand or foot.[6] But in spite of this champions were freely used; and in 1275 they were recognised by a statute, which enacted that they need not swear as to their own knowledge of the cause which they were hired to maintain.[7] Churches,[8] landowners,[9] and communities permanently retained such champions.[10]

The forms of a trial by battle are described at length by Blackstone,[11] as such a trial was still part of the law of England when he wrote. But we can see that even when Glanvil wrote it is beginning to be looked upon with disfavour. The manner in which he contrasts the trial by battle with the new form

oportet quod appellatus, qui in seysina fuerit, hoc disrationet versus eum per corpus suum, et sic perveniri poterit inter eos ad duellum." In some cases a record might be proved false in this way, f. 157.

[1] Glanvil viii 8; P. and M. ii 663, 664; Lea 123, 124; Reeves, H.E.L. i 206.

[2] As to debt see Glanvil x 5; P. and M. ii 203. It soon ceases to be available in such cases, ibid 204.

[3] Lea 129, 130.

[4] See the judgment of Ellenborough, C.J., in Ashford v. Thornton (1818), 1 B. and Ald. 405, 456.

[5] Lea 182. The foreign civilians compared them with the Roman gladiators, ibid 187.

[6] Bracton f. 151 b. citing the case of Elias Pigo; Glanvil ii 3. The champion must assert that he knows the truth of the cause for which he fights, P. and M. ii 604.

[7] 3 Ed. I. c. 41 (Statute of Westminster I.).

[8] Lea 197, citing an agreement of 1258 between the abbey of Glastonbury and Henry de Fernbureg.

[9] P. and M. ii 630.

[10] Ibid 664; Lea 196, 197.

[11] Comm. iii 338-341; App. XXVII.

of trial by the grand assize shows that the best lawyers already distrusted it.[1] It becomes obsolete for reasons very similar to those which were fatal to compurgation. The church turned against it.[2] It appeared merely barbarous to those learned in the civil law.[3]

In England it lasted till the 19th century as a possible alternative in real actions to the Grand Assize, and as a means of disproving an appeal of felony.[4] It was really obsolete by the end of the 13th century. When it does occur in the Year Books it is described as though it was a legal curiosity.[5] Isolated cases, however, still kept it in remembrance. In 1571 Dyer reports how the judges in their scarlet robes and the serjeants adjourned to Tothill fields where a crowd of four thousand persons had gathered to witness the fight.[6] But the demandant made default and the fight did not take place. Another case occurred in 1638,[7] but again no fight took place. The case of *Ashford v. Thornton*[8] (1818) showed that the battle was still a legal method of proof in appeals of murder. In 1819 the trial by battle was for all purposes abolished.[9]

(iii) *Ordeal.*[10]

Trial by battle is in a sense a mode of trial by ordeal. The trial by ordeal rests upon the belief that God will intervene by a sign or a miracle to determine a question at issue between two contending parties. This belief is almost universally found among primitive races. Without taking account of less important forms of the ordeal,[11] we find that the person who can carry red-hot iron, who can plunge his hand or his arm into boiling water, who will sink when thrown into the water, is deemed to have right on his side.[12]

[1] II. 7. "In the midst of the dry details of his treatise we come suddenly upon a passage full of sentiment, which testifies to the powerful contemporaneous impression made by the first introduction of the organized jury into England," Thayer, Evidence, 41, 42.

[2] Lea 208. Innocent III. condemned it at the Lateran council 1215.

[3] Ibid 211, 212. In 1231 Frederic II. in his code for Naples prohibited it when any other proof was possible. But Stamford who wrote in 1557 on the Pleas of the crown still professes belief in it, Pleas of the Crown c. 15.

[4] Battles in the military court before the constable and marshal are quite distinct. The arms e.g. are different, Bl. Comm. iii 337, 339; Neilson 167, 168. See "The order of battel in the Court of Chivalry," composed by Thomas of Woodstock, Duke of Gloucester, Black Book of the Admiralty (R.S.) i 300-329. Thayer, Evidence, 43, 44. It had begun to die out early in the 13th century, Select Pleas of the Crown (S.S.) xxiv.

[5] Lowe v. Paramour, Dyer 301.

[6] 1 B. and Ald. 457.

[7] Claxton v. Lilburn, cited Lea 244, 245.

[8] 59 Geo. III. c. 46.

[9] Lea, Essay III.; Thayer, Evidence, 34-39; P. and M. ii 596, 597.

[10] See Lea 334-379.

[11] For details as to these see Lea 278, 286, 318.

The belief is so natural that very modern illustrations of it are not wanting. Mr Lea tells us that in 1811 a Neapolitan noble, suspecting the chastity of his daughter, exposed her to the ordeal of fire, from which she barely escaped with her life.[1] Like the other methods of proof it decayed; and for very similar reasons. It opened the door to corruption.[2] It was hard to get convictions. Between 1201 and 1219 Professor Maitland has only found one case in which it did not acquit the accused.[3] William Rufus on an occasion, when it had let off fifty persons whom he wished to see convicted, openly mocked at it.[4] By the Assize of Clarendon persons of bad fame who had successfully passed through the ordeal were obliged to abjure the kingdom.[5] Finally it was condemned by the Lateran Council of 1215. In England this decree was promptly observed. In a writ addressed by Henry III. to certain of his itinerant justices in 1219 the use of the ordeal is prohibited[6] It is not mentioned as a method of proof in Bracton's work. We shall see that the gap thus left was one of the causes which helped on the growth of trial by jury.

(iv) *Trial by witnesses.*[7]

In certain cases the parties might produce witnesses, and their sworn statement decided the question. Thus in 1219 the age of a person is decided by 12 witnesses selected by the party.[8] In other cases the secta was examined and treated as witnesses, while the defendant's witnesses were also examined, and the case decided according to the probability, and consistency of the tales of the two sets of witnesses. In 1234 the ownership of a mare was so settled.[9] The question whether a husband was dead, so that the widow can claim dower, was settled in this way till 1834.[10] In a case cited in Dyer the demandant brought two witnesses: the tenant had none. The court gave judgment for the demandant "quod qui melius probat melius habet.[11]

[1] At p. 317. For other modern instances of a similar sort of superstition see ibid 290, 357, 367, 397. [2] Lea 404, 405.

[3] Select Pleas of the Crown (S.S.) 75.

[4] Eadmer, Hist. Nov. (R.S.) 102. "Igitur cum principi esset relatum, condemnatos illos tertio judicii die simul omnes inustis manibus apparuisse, stomachatus, taliter fertur respondere, Quid est hoc? Deus est justus judex? Pereat qui deinceps hoc crediderit. Quare, per hoc et hoc, meo judicio amodo respondebitur, non Dei, quod pro voto cujusque huic inde plicatur." [5] § 14.

[6] For the writ see Rymer's Fœdera i 228. Thayer, Evidence, 37, 38; P. and M. ii 597. [7] P. and M. ii 634-637; Thayer, Evidence, 17-24.

[8] Bracton 424 b. [9] Thayer, Evidence, 21, 22; P. and M. ii 635.

[10] Y.B. 16 Edward III. (ii) (R.S.) 86-90 (no. 27), cp. Introd. xx-xxv. Selden notes to Fortescue, De Laudibus, c. 21 n. 8; Coke, 4th Instit. 279; Reeves, H.E.L. ii 401, 402. [11] Thorn v. Rolff (1560) Dyer, 185.

But this method of trial does not become of any importance in English law. The method of submitting questions to the jury was the usual and the easier plan. Thus we find it said in 1515 that the age of a person is decided by 12 jurors—not by 12 witnesses as in Bracton's day. But the jurors in such cases still retained traces of their old position, in the fact that they were required to give reasons for their verdict as to the age.[1]

In other cases this method of proof became merely a trial by the court. Thus it is described by Coke as a trial "by the justices upon proofs made before them."[2] In fact the development of trial by jury prevented this trial by witnesses from developing into a regular and usual procedure like the inquest of the canon law.[3]

Such were the older methods of proof. The court was interested simply in determining which of the two parties must go through the forms of the selected proof, and in seeing that the forms were observed. The decision followed, as of course. They seem to us barbarous and unreasonable. But, for the age in which they flourished, it is difficult to see that any other methods would have been possible. A judicial mind is not one of the possessions of the impulsive person who feels keenly; and such a temperament is the prevailing characteristic of a barbarous race. We do not expect, even in modern times, an impartial account of contemporary political events. Lawsuits in a primitive age, when men are bound more closely together by ties of kindred or neighbourhood, were more exciting than politics are to us. Many persons regard the submission of international disputes to arbitration as visionary, and even cowardly. It must have appeared to men of that time as absurd to submit their feuds to the decisions of a court. Trial by battle was the obvious solution; and law obtained a great triumph when it regulated its conditions. The age was superstitious, and miracles were plentiful because they were believed. It did not appear absurd to hope that God would protect the right. But it was also an age of corruption; and in a really corrupt age it is easier to meet a perjured claim

[1] Thayer, Evidence, 20 (citing Keilway, 176, 177). Possibly the expedient of parties putting themselves on the witnesses and a jury shows us the way in which, in some cases, trial by witnesses developed into trial by jury, Thayer 97-100. Fortescue, De Laudibus, c. 32 notes that in cases before the Admiral, and other jurisdictions outside the common law, trial by witnesses is used; but, he says, the common law "never determineth a controversy by witnesses only, that may be determined by a jury of twelve men."

[2] 9 Co. Rep. 30 b; P. and M. ii. 634.

[3] P. and M. ii 636, 637.

by more detailed and particular perjury than to establish the truth. Battle, ordeal, and compurgation were suited to the age in which they flourished. Growing civilization demanded a more clear and certain test.

2. The Jury.

i. The origin and the different uses of the jury.

"Everywhere," says Maine, "in the Teutonic countries we find deputies of the king exercising authority in the ancient courts, insisting that justice be administered in the king's name, and finally administering a simpler justice of their own amid the ruins of the ancient judicial structures fallen everywhere into disrepute and decay."[1] The jury is simply a more effective test which that "simpler justice" was able to apply, in order to ascertain disputed facts. The Carlovingian kings knew a procedure which they styled the inquisitio. By virtue of this procedure their officials could summon the members of any community they pleased, and make them supply any information which they desired, touching the administration of their government. Such information might affect either the judicial or the administrative departments of government. In fact, as we know from our own history, an accurate separation of the departments of government is unknown in a primitive age. The Norman dukes inherited these powers; and they brought them to England. These powers, as applied by the Norman kings, are the root from which the English jury springs.[2] As Professor Maitland puts it, the essence of the jury is this:—"A body of neighbours summoned by some public officer to give, upon oath, a true answer to some question."[3] The questions may range over the whole field of government. They may, or may not, be questions which are at issue between two litigating parties. The sphere of the jury, therefore, when it makes its appearance in England, is very wide.

It is not difficult to illustrate this from the reigns of the Norman kings. Domesday Book (1085-6) was compiled from the verdicts of jurors. It is a comprehensive enquiry into the extent, value, and tenure of all the lands of England. The enquiry is made "per sacramentum vicecomitis sciræ et omnium baronum et eorum Francigenarum et totius centuriatus, presbiteri, præpositi, vi. villanorum uniuscujusque villæ."[4] In a suit connected with land at Ely about 1080

[1] Early Law and Custom 172.
[2] P. and M. i 119-121; Thayer, Evidence, 47-50.
[3] P. and M. i 117.
[4] Stubbs, Sel. Ch. 86.

certain English were chosen to say upon oath what they knew of the facts.[1] Henry II. made the most extensive use of it in all departments of government. We have seen that in the grand assize and in the possessory assizes it might be used to settle questions as to the ownership or possession of lands.[2] In the assizes of Clarendon and Northampton most comprehensive questions were addressed to the juries. They were required to answer among other things, as to those suspected of crime, as to escheats, as to outlaws, as to the misdoings of officials.[3] The Inquest of Sheriffs required them to answer a series of interrogatories as to the doings of the sheriffs.[4] They assisted in assessing persons to the Saladin tithe.[5] We have seen in describing the judicial eyre the vast variety of subjects upon which the king's justices expected to be informed.[6]

Some part of these miscellaneous uses to which the jury was put, tend to disappear with the rise and growth of Parliament in the 13th and 14th centuries. The king could get the information and the money he required from Parliament. He had no need to send his justices round the country to summon juries for this purpose. Parliament is the grand inquest of the nation. The use of the jury is limited to purposes partly administrative, but chiefly judicial. It is used partly to give the crown information. Its chief use is to decide the facts at issue in a law suit. It is its development in this direction which has made it famous. It is this development which is peculiar to English law. The reason why it is peculiar to English law is to be found in the precocious development of that law. A rational system of trial was needed; and the jury was so adapted that it supplied the need. Elsewhere the development was not so rapid. The lawyers who systematized the continental codes of law had more thoroughly assimilated the ideas of the civil and the canon law. They supplied the gap left by the decay of the older systems of trial with an elaborate calculus of proof, assisted by admissions extracted by torture, and witnesses examined in secret.[7]

The two main uses of the jury therefore are (1) administra-

[1] Bigelow, Placita, 24 [2] Above 21. [3] Stubbs, Sel. Ch. 143, 150.
[4] Ibid 148. [5] Ibid 160. [6] Above 114, 115.
[7] P. and M. ii 653-655. The contrast between the English and the continental system was well marked when Fortescue wrote. See De Laudibus caps 21-23. Beccaria c. 16, in a passage quoted by Blackstone, thus describes the result of the continental system, "the force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime."

tive and (2) judicial. Under the first head fall the grand jury, or jury of presentment, and the coroner's jury. Under the second head fall the assizes, the jurata, and the petty jury.

(1) The jury used for administrative purposes.

(*a*) *The grand jury or jury of presentment.*

We must probably date this jury from the assize of Clarendon. The first section of that assize provides "quod per singulos comitatus inquiratur, et per singulos hundredos, per xii. legaliores homines de hundredo, et per iv. legaliores homines de qualibet villata, per sacramentum quod illi verum dicent: si in hundredo suo vel villata sua sit aliquis homo qui sit rettatus vel publicatus quod ipse sit robator vel murdrator vel latro vel aliquis qui sit receptor robatorum vel murdratorum vel latronum, postquam dominus fuit rex. Et hoc inquirant Justitiæ coram se, et vicecomites coram se."[1]

We have seen that the accusing thegns of Ethelred's law are somewhat like this accusing jury or jury of presentment.[2] We cannot however actually connect them with Henry's jury. We cannot say that this institution has, like the fyrd, a continuous history which can be traced from Saxon to Norman times.

These legal men of the hundred and the vill reported and recorded the scandal of the country-side. Their reports were, and were designed to be, the foundation of the proceedings both of the eyre and of the sheriff's tourn.

We can see the manner in which the system worked from the accounts we possess of the eyre and the tourn.[3] In both cases there is, in accordance with the assize of Clarendon, a system of double presentment. In the tourn presentments are made by the tithings or townships to a jury of 12 freeholders or knights of the hundred. At the eyre presentments are made to a representative jury of knights chosen from the different hundreds. Thus, these accusing juries may either present as from their own knowledge, or they may present things which they know only by report.[4] At the present day a grand jury may notice or present offences from their own knowledge or observation; or, as is more usual, they may endorse the indictments or accusations made by others.[5]

The presentments made by the grand jury do not amount to the assertion that the person presented is guilty; merely

[1] Stubbs, Sel. Ch. 143.
[2] Above 7 n. 8, and authorities there cited.
[3] Above 43, 44; 112-116.
[4] P. and M. ii 640, 641.
[5] Harris, Criminal Law, 324, 325.

that he is suspected. The steps taken to test that suspicion we shall deal with when we come to speak of the petty jury. The function of the grand jury is merely to say whether there is a probable ground of suspicion. They must be certain from the evidence for the prosecution (at which alone they look) that this probability exists. The question of actual guilt or innocence is not and never was a question for the grand jury as such.[1]

In the 13th century the jury was selected from the various hundreds. Juries of this kind were needed in order to answer the detailed enquiries contained in the articles of the eyre. We have seen that the eyres gradually ceased. The judicial work of the country was turned over to the justices of the peace in quarter sessions, and to the justices of the assize, both of whom acted for the whole county.[2] For this reason the method of the selection of the grand jury changed.[3] The sheriff was directed to choose, for the purposes of the sessions, or the assizes, 24 persons from the body of the county.[4] Of these, 23 are chosen, a majority of whom decides whether to find "a true bill," or to "ignore" the accusations preferred.

The grand jury of modern times still retains some traces of antiquity which have been lost to other branches of the jury. They deliberate in secret.[5] They are not controlled or advised by the Court. The Court merely charges them generally as to the business which will come before them. They can act if they please on their own knowledge. They are acting much in the same way as they acted in the 13th century.

(*b*) *The coroner's jury.*

We have seen that the coroner was an elective official appointed to look after the interests of the crown in each county.[6] He was bound to summon a jury to inform him as to the facts of the various kinds of cases into which it was his duty to enquire. In the 13th and 14th centuries this jury consisted of persons taken from the four or more neighbouring townships, together with twelve men of the hundred.[7] "The four vills and the twelve men seem often to be regarded

[1] P. and M. ii 639, 645, 646. Cf. Pleas of the crown for the county of Gloucester xliii, the jurors may declare a man innocent and yet be amerced because they did not present him in proper time. Bl. Comm. iv 300.

[2] Above 115, 116. [3] See P. and M. ii 646, 647; Reeves, H.E.L. ii 425-426.

[4] Hale, 2 P.C. 153-155. See 6 Geo. IV. c. 50; 33,34 Vict. c. 77.

[5] Only on one occasion—the Earl of Shaftesbury's case (1681)—were they compelled to received their evidence in public, 8 S.T. 759; Campbell, Lives of the Chief Justices, ii 39, 40.

[6] Above 44-47. [7] Select Coroners' Rolls (S.S.) xxx, xxxi, and notes.

as two distinct bodies; their verdicts may be given separately. Then again, each vill may make its own statement; or the vills may find a verdict collectively and severally. The number of persons from each villata seems to have been indeterminate . . . as many were summoned as were deemed sufficient for the inquest."[1]

In the Anglo-Saxon and Norman period the four townships appear to have been used for very varied purposes. According to the laws of Edward the Confessor,[2] the finder of an article should at once show it to the reeve and the men of the township; and the reeve should give notice to the four neighbouring townships. Bracton tells us[3] that a would-be appellor should at once raise the hue and cry, and go and make known his wrongs to the neighbouring townships. If he has not done this the appellee need not answer his appeal. We find in the coroners' rolls that duties of a very miscellaneous character are imposed upon them.[4] They assisted in making the presentments at the eyre and at the sheriff's tourn.[5]

It is clear that the neighbouring townships were more likely to know the facts of any occurrence than a body of persons chosen at large from the hundred. As a body likely to know the facts they appear in Anglo-Saxon law. For the same reason they were naturally used by the crown when it desired to make an inquisitio.[6] The Normans, in fact, organized and used for the purposes of their inquisitions an existing Anglo-Saxon institution. We shall see when we come to speak of the petty jury that these four townships play some part in its development.

In later law the coroner's jury is chosen, like the grand jury, from the body of the county.[7] It is a jury historically interesting, because we have in it a survival from the time when juries were employed to answer many questions which had no reference to judicial proceedings.[8]

(2) The jury used for judicial purposes.

(*a*) *The assizes.*[9]

The assizes fall under two main heads. (1) The Grand Assize, which provides a machinery for trying disputed claims to property. (2) The possessory assizes, which provide a

[1] See Coroners' Rolls (S.S.) xxx, xxxi, and notes. [2] c. 24. [3] f. 139 b.
[4] Select Coroners' Rolls Note B xxxvii-xl. [5] Above 43, 44; 112-116.
[6] Select Pleas of the Forest (S.S.) passim. [7] Hale, 2 P.C. 167.
[8] We may class under this head also the inquest of office—an enquiry made by some official, or by special commissioners, by a jury of uncertain number, concerning any matter which entitles the king to any property real or personal, Bl. Comm. iii 258-260.
[9] P. and M. i 123-129. As to the various meanings of the word see above 116.

machinery for trying disputed claims to seisin or possession. These "inquisitions" or "recognitions" "were so many new modes of trial on particular questions, established by a dead lift of royal power."[1]

(1) The Grand Assize.

This, Glanvil tells us, is a "regale beneficium,"[2] by means of which a man may defend the right to his free tenement without the risk of the doubtful issue of the battle. The tenant could choose either the battle or the grand assize;[3] and if the plaintiff objects to his choice of the grand assize he must support his objection with valid reasons.[4] The case being one which can be tried by the grand assize, the plaintiff must take the next step by obtaining another writ, "ut per quatuor legales milites de comitatu, et de visineto eligantur duodecim milites legales de eodem visineto, qui super sacramentum suum dîcant uter litigantium majus jus habeat in terra petita."[5] If some or all of the 16 persons differ or are ignorant of the facts more must be summoned till there are at least 12 who will agree upon their verdict.[6] Their verdict closes the question between the plaintiff and the tenant once for all.[7]

We can see from Glanvil's account that this is a new procedure. The tenant could, if he pleased, defend himself by the battle;[8] and many incidental questions, e.g. questions as to summons,[9] or whether it was a case for the grand assize,[10] could be decided by battle or compurgation in the accustomed manner. At the same time we can see that the idea that the "visinetum" should decide these questions is growing; for this method of decision is sometimes placed by the side of the old method.[11] The grand assize fell into disuse with the growth of more modern and convenient remedies for settling the question of the ownership of real estate. But it lived on till the abolition of real actions in

[1] Thayer, Evidence, 55.

[2] ii 7. On the question whether the epithet Magna applied to assisa is, or is not an interpolation, see Reeves i 187 n. 2.

[3] Glanvil ii 3 and 6.

[4] Ibid.

[5] Ibid ii 10. Knights girt with swords were always the recognitors of the grand assize; see Thayer, Evidence 45 n. 4.

[6] Ibid ii 17. ii 21, it is said, "Si vero reperiantur nulli milites de visineto nec in comitatu ipso qui rei veritatem inde sciant, quid juris erit?" The law is left doubtful.

[7] Ibid ii 18, "Lites enim per magnam assisam domini regis legitime decisse, nulla occasione rite resuscitantur imposterum."

[8] Ibid ii. 5.

[9] Ibid i 9, "Si summonitiones omnes negaverit pro qualibet jurabit duodecima manu."

[10] Ibid ii 6.

[11] E.g. ii 3, on the question whether a champion after wager of battle has died a natural death, pending the suit; ii 6, on a question of consanguinity.

1834.[1] The latest case was that of *Davies* v. *Lowndes* tried in 1835 and again in 1838.[2]

(2) The possessory assizes.

We have already seen that the chief possessory assizes are four in number—the assize of novel disseisin, of mort d' ancestre, of darrein presentment, and the assize utrum.[3] In these assizes there was no choice. The parties were obliged to proceed by way of recognitio "beneficio constitutionis regni."[4] The proceedings began with a writ to the sheriff to summon 12 free and lawful men of the neighbourhood to answer the questions raised by the assize.[5] The seisin is adjudged according to the answer made by the assize. These assizes lasted till the abolition of real actions in 1834.[6]

(*b*) *The jurata.*

The term jurata and assisa are often used convertibly by the earlier writers, such as Glanvil, to mean a body of persons summoned by public authority to answer some disputed question of fact.[7] But the two terms had a distinct meaning as we may see by the expression, used in Fleta and Bracton, "assisa vertitur in juratam." The broad difference was this:—The assisa was a body of jurors summoned to answer certain specific questions, in accordance with a positive law which enacted that such questions should be answered in this particular way. Their sole power was to answer these particular questions. Incidental questions might be answered in Glanvil's day by battle or other ordinary method of proof.[8] But as time went on the ordinary method of proof came to be the jury. The parties would usually agree to submit these preliminary or incidental questions to a jury. The new body of persons so summoned in accordance with the agreement of the parties to decide these questions is the jurata into which the assize is converted.[9] Thus Booth[10] says "the assize is said to be turned into a

[1] 3, 4 Will. IV. c. 27 § 36.
[2] 1 Bing. N.C. 597; 5 Bing. N.C. 161.
[3] Above 21.
[4] Glanvil xiii 1.
[5] Ibid xiii 6, "Ab initio eligendi sunt duodecim liberi et legales homines de visineto secundum formam in brevi expressam."
[6] Blackstone (Comm. iii. 186, 187) points out that as an assize of mort d'ancestre did not lie of lands devisable, it followed from 32 Henry VIII. c. 1, and 12 Car. II. c. 24 that no such assize could afterwards be brought, since the effect of these statutes was to make all lands devisable.
[7] Y.B. 12, 13 Edward III. (R.S.) xli; Co. Litt. 154 b.
[8] Glanvil xiii 11.
[9] Y.B. 12, 13 Edward III. (R.S.) xlviii. "The actual result is not to change the functions of the 12 men summoned in the first instance, but to substitute other 12 for them."
[10] Booth, Real Actions (Ed. 1701) 213, 214. See Reeves, H.E.L. i 354, 355.

jury when they are to enquire of matters put in issue out of the point of the assize, i.e. out of the point of seisin and disseisin, which points must first be determined before the assize can be taken as to the seisin and disseisin, as if the tenant plead in abatement to the writ, as villeinage, etc., or other matters triable by a jury, and issue is taken; or matters in bar, as a release, agreement, etc." There were also other differences as to the method of summons. The assize as we have seen was summoned in the writ by which the action was begun. The jury was summoned by writ of Venire facias, when the parties were at issue on some specific fact raised by the pleadings.[1]

We have seen that even in Glanvil's time incidental questions might be referred to a jurata, the visinetum, or the patria. But in his book they stand side by side with the older methods of proof. The new forms of action invented in the 13th century gave to the newer method of trial a great extension.[2] It was the necessary mode of trial in all actions of trespass, and the various offshoots of that action, which were destined in time to take the place of so many of the older forms. In 1304 proof by battle was refused in an action of trespass.[3] Britton, for this reason, recommended the procedure by way of action for trespass, rather than the procedure by way of appeal.[4] It was the mode in which the questions raised by writs of entry were answered.[5] It soon becomes common form for the one party, when he has stated on the pleadings a fact denied by the other, to "put himself upon the country"; and for the other "to do the like." Fortescue[6] in the 15th century can, with substantial truth, state perfectly generally that, "as oft as suitors in the courts of the king of England, are come to the issue of their plea upon the matter of the fact, forthwith the justices by virtue of the king's writ, do write unto the Sheriff of the

[1] Y.B. 12, 13 Edward III. (R.S.) liv. "An action in which the facts were to be ascertained through a body of men summoned by virtue of an original writ, to pronounce upon issues mentioned in that writ, was regarded as belonging to a class different from actions in which the issue of fact to be evolved out of the pleadings was unknown at the time of commencement, and had to be determined by a body of jurors to be brought together at some future time by virtue of a judicial writ of Venire facias." See below (162) as to differences arising from the altered process.

[2] P. and M. i 128, 129; ii 617; Thayer, Evidence, 66, 67.

[3] Y.B. 32, 33 Edward I. (R.S.) 318, 320.

[4] i 123. We have seen that in the 16th century assumpsit took the place of debt to evade compurgation, above 140.

[5] P. and M. ii 617.

[6] De Laudibus c. 25. The same fact is recognised by the statute 15 Henry VI. c. 5 (quoted Thayer, Evidence, 67, 68.)

county, wherein the deed is supposed to be done, that he do cause to come before the same justices at a certain day by them limited, xii. good and lawful men, neighbours to the place where the fact is supposed to be done . . . to the end that by their oaths it may certainly be known, whether the deed were done as the one party affirmeth, or else as the other party denieth."[1]

(*c*) *The petty jury.*

The petty jury, or the jury impannelled to try the guilt or innocence of a prisoner presented by the grand jury, is a form of the jurata, because it rested (theoretically) on the consent of the prisoner. It must be separately treated, because it has a separate history.

The accused might ask for, and, in John's reign, get by payment, the right to be tried by a jury.[2] His strict right was to prove his innocence in one of the orthodox ways—battle, compurgation, or ordeal. But the battle did not lie where the crown was the accuser. Compurgation had been discredited by the assize of Clarendon (1166). The ordeal had been abolished by the Lateran council of 1215. What was to take the place of these older institutions? The writ addressed to the judges in 1219[3] tells them that nothing had as yet been determined. It directs that those accused of great crimes and suspected shall be imprisoned—but not so as to endanger life or limb. Those whose crimes are less heinous may abjure the realm. Those accused of smaller offences may be released, if they will find securities to keep the peace. But, it concludes, much must be left to the discretion of the justices.[4]

To apply the jury to the trial of such persons was the obvious expedient. But the jury rested upon the consent of the accused to this method of trial. What if he refused

[1] Twelve becomes to be the usual number of the jury. In earlier times the number varied; and the grand jury, the grand assize, the inquest of office, and the attaint jury did not consist of that number. Coke (Co. Litt. 155) thinks "that the law delighted herself in the number of twelve. For there must not only be twelve jurors for the trials of matter of fact, but twelve judges of ancient time for trial of matters in law in the Exchequer Chamber. Also for matters of state there were in ancient time twelve counsellors of state. He that wageth his law must have eleven others with him which think he says true. And that number of twelve is much respected in Holy Writ, as twelve apostles, twelve stones, twelve tribes, etc."

[2] P. and M. ii 615, 616. [3] Rhymer, Fœdera, i 228.

[4] "Cum igitur nihil certius providerit in hac parte concilium nostrum ad præsens, relinquimus discretioni vestræ hunc ordinem prædictum observandum in hoc itinere vestro, ut, quo personas hominum, formam delicti, et ipsarum rerum veritatem melius cognoscere poteritis, hoc ordine, secundum discretiones et conscientias vestras in hujusmodi procedatis."

to consent? The obvious answer is, impannel a jury and try him whether he consent or not. It has taken more than 500 years to arrive at this obvious answer.

It is true that Bracton thought that this might be done.[1] It is true that at least two precedents can be produced where this was done.[2] But Professor Maitland points out that these two precedents stand alone.[3] In spite of Bracton's authority, such a change in the old law, on a matter that touched life and limb, could not be endured. The end of the 13th century was not a time, like the middle of the 12th century, when far-reaching legal changes could be made by the authority of the crown alone. Public opinion could now force a hearing; and public opinion, as we may see from certain clauses in Magna Charta,[4] was apt to be retrogressive in its ideas. The author of the "Mirror of Justice" was in some ways a fair representative of the average conservative opinion of the day. He considered it "an abuse" that men were driven by the judges to put themselves on their country, when they had offered to defend themselves by their bodies.[5]

The result was, not that the older methods of proof were restored, but that consent to be tried by a jury was forced by the peine forte et dure.[6] In 1275[7] statutory force was given to this expedient. Notorious felons (not those merely lightly suspected) who decline to put themselves upon their country when indicted at the king's suit "shall have strong and hard imprisonment." Britton,[8] among other details, adds that they are to be put in irons. But at the beginning of the 13th century nothing is said as to pressing to death; and, as Stephen says, the rule as to eating and drinking on alternate days shows that this is an innovation.[9] In 1406 we have the judgment in substantially the modern form.[10] This senseless

[1] ff. 142 b, 143 b. [2] Hale, 2 P.C. 322.

[3] P. and M. ii 648. Gloucester Pleas xxxix. See cases 111, 161, 213, 316, 330, 414, 435, the prisoner is either kept in prison, abjures the country, is bound over to keep the peace, or the case is adjourned as the writ of 1219 directs.

[4] Above 36. See Thayer, Evidence, 56, 57. [5] V. i §§ 19, 126, 127.

[6] In the case of felonies. In the case of treasons and misdemeanours refusal to plead or standing mute was equivalent to a conviction, Stephen, H.C.L. i 298.

[7] 3 Edward I. c. 12; Reeves, H.E.L. ii 48-50, 426. He thinks (quoting Fleta I. 34, 33) that it reinacted an old penalty against those who declined to adopt any method of proof.

[8] i 26, 27. Fleta I. 34, 33 says nothing of irons.

[9] H.C.L. i 300. See also the words of the writ of 1219. Those suspected are to be imprisoned but "ita quod non incurrent periculum vitæ et membrorum." This would seem to show that the view of Hale (2 P. C. 322) and Coke (2nd Instit. 179) that the peine forte et dure existed at common law is erroneous.

[10] Thayer, Evidence, 75, quoting Y.B. 8 Henry IV. 1, 2. If the prisoner declined to plead a jury was sworn to see if he was mute of malice or by the visitation of God, Stephen, H.C.L. i 298.

barbarity was part of the law of England till 1772. In that year it was enacted that standing mute in cases of felony should be equivalent to a conviction.[1] In 1827 it was enacted that if the prisoner stands mute in cases of treason, felony, or misdemeanour, a plea of not guilty shall be entered and that the trial shall proceed as if the prisoner had pleaded.[2]

Thus indirectly trial by jury in criminal cases was introduced. The question arises, what was the composition of this jury? In the 13th century the hundred jury, who had presented the man as suspected, were usually asked "præcise dicere," guilty or not guilty.[3] But in the early 14th century this was felt to be a hardship.[4] It seems however to have been thought that some of those who had presented the accused should be placed upon the petty jury with a view to secure a conviction.[5] In 1351 it was enacted that no indictor be put on an inquest upon the deliverance of one indicted for trespass or felony if he be challenged for this cause by the accused.[6] With the indictors, or persons who had presented the accused, there were usually associated other persons. These persons were naturally chosen from the neighbourhood of the crime. They were in the 13th century often chosen from the four townships, which, as we have seen, often played a part at the coroner's inquest.[7] Their connexion with these inquests would doubtless render their assistance valuable to the petty jury. Such juries, however, from the township would often consist, not of liberi et legales homines, but of villani. Though in Henry III.'s reign the petty jury may have sometimes been drawn from the four townships, they do not appear in connexion with the petty jury in Edward I.'s reign.[8] We have seen that with the disuse of the eyre these juries from the townships and hundreds cease to appear. The petty jury comes to be drawn, like the other forms of the jury, from the county at large.[9]

The jury thus supersedes the older methods of proof. But it was introduced as we have said, at a time when the pro-

[1] 12 Geo. III. c. 20. [2] 7, 8 Geo. IV. c. 28.
[3] P and M. ii 645, 646; Thayer, Evidence, 81, 82.
[4] Y.B. 30, 31 Edward I. (R.S.) 531; Britton i 30.
[5] Y.B. 14, 15 Edward III. (R.S.) 261. Paring, J., "if indictors be not there it is not well for the king."
[6] 25 Edward III. St. 5 c. 3. The rule was the same in cases of treason in the 17th century, Co. Litt. 157 b.
[7] Thayer, Evidence, 82; Select Coroners' Rolls (S.S.) xxxii. [8] P. and M. ii 646.
[9] This was a gradual process. Fortescue (c. 25) says that four at least shall come from the hundred wherein the fact is alleged. 35 Henry VIII. c. 6 § 3 required six. 27 Eliza. c. 6 § 5 reduced the number to two in personal actions. But Coke (Co. Litt. 125) says that they should come from the town, parish or

cedure of these older methods of proof constituted men's only idea of a trial. It simply took their place, and was adapted with as little change as possible to its new environment. We can see this most clearly if we look at the formal record of a trial.[1] The record states the commission of the judges, the presentment of the grand jury, the indictment, the plea, the fact that the accused places himself on his country, the summons of the jury, the verdict, and the judgment. It "takes no notice either of the evidence or of the direction given by the judge to the jury."[2] The jury is regarded as a formal test to which the parties have submitted. The judgment follows, as under the old system, the result of that test. But to ask in what manner one of the old tests worked, to lay down rules for its working, would have been almost impious; for are not the judgements of God past finding out? The record tells us that when the jury was first introduced the method by which it arrived at its verdict inherited the inscrutability of the judgements of God.[3] The later methods which the law has devised to attain a correct verdict are the trial in the modern sense of the word. We shall deal with these methods in the two following sections. It is by comparing the record with a full report of a modern trial that we can see how the jury has taken the place of the older methods of proof, and how, around the jury there has grown up all the ideas and associations which the word "trial" naturally evokes.

ii. The growth of the judicial functions of the jury.

The jury, then, was a body of neighbours called in, either by express law, or by the consent of the parties, to decide disputed questions of fact. The decision upon questions of fact was left to them because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge. For this reason it has been said that the primitive jury were witnesses rather than judges. They did in fact combine the

hamlet wherein the fact is alleged, though he admits that in some cases they may come de corpore comitatus (ibid 157). 4 Anne c. 16 § 6 and 24 Geo. II. c. 18 enacted that in civil cases the jury should come from the body of the county. See Ilderton v. Ilderton (1793) 2 H. Bl. at p. 161. The statutes regulating the modern practice are 6 Geo. IV. c. 50 and 33, 34. Vict. c. 77.

[1] For specimens of the record in civil and criminal cases see Jacob's Law Dictionary *sub. voc.* Trial. The same remarks apply to both kinds of record.

[2] Stephen, H.C.L. i 309.

[3] Coke, 3rd Instit. 26, 27, "the indictment is no part of the trial, but an information or declaration for the king, and the evidence of witnesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses, but by the verdict of twelve men, and so a manifest diversity between the evidence to a jury, and a trial by jury."

functions of witnesses and of judges of fact. But we should note that our modern conception of a witness is, like our modern conception of a trial, of comparatively recent origin. We shall see that it is not till the judicial functions of the jury have become predominant that we get witnesses summoned to give their evidence to the court upon oath.

The jury were in a sense witnesses. But they formed a part of the court. They were a method of proof which the parties had agreed to accept. They represented the sense of the community—hundred or shire—from which they were drawn; and in the days when such communities had each their court, when individuals lived more simple and more similar lives, the sense of the community was a thing more distinctly realised.[1] These diverse causes prevented their ever being treated as witnesses. They could not be separately examined by the court. They gradually became less of witnesses, more of judges. Though there had been at first some fluctuation of practice, it was settled in the middle of the 14th century that they must give a unanimous verdict; and this was a sign that their judicial character was becoming predominant.[2] Had not the judicial character of the jury thus triumphed over their character as witnesses the jury would probably have had no history. Neither Fortescue[3] nor Sir Thomas Smith[4] would have been able to describe the striking differences between the common law and the civil law with respect to trials and evidence. At the same time the double capacity of the jury lasted on till the later part of the 17th century. It is not till after the 17th century that the jury practically lose their character as witnesses.

The process by which the judicial character of the jury absorbs their character as witnesses was slow and gradual. This is clear from the tenacity with which the law clung to the idea that they must come from the immediate neighbourhood of the occurrence in issue.[5] The change was due to two sets of causes. The first is contained in the question, how may the jury inform themselves. The second is contained in the question, to what persons may the parties object as jurors.

[1] P. and M. ii 619-625.

[2] Thayer, Evidence, 86-88; Evelyn's Notes to Hale, P.C. ii 297-299. The rule was settled certainly by 1367, see Y.B. 41 Ed. III. 31, 36 quoted by Thayer, and Hale loc. cit. Britton i 31 would seem to show that in the 13th century the view of the majority might be taken. Reeves, H.E.L. ii 407, 408.

[3] De Laudibus c. c. 20-24.

[4] Smith, Republic (Ed. 1640) 193-197. Cp. Hale, Common Law, 347, 348.

[5] Above 155 n. 9.

How the jury may inform themselves was not in the 13th century defined. The answer to that question comprises, indeed, a large part of the law of evidence, the main rules of which are far more recent.[1] Bracton[2] and Britton[3] consider that the jury should take the best means they can to get at the truth, and talk it over among themselves. If they are still ignorant they may be afforced by those who know better.[4] Juries were summoned from persons likely to know. Thus we have a jury of Florentine merchants living in London summoned to decide as to an act alleged to have taken place at Florence; and a jury of cooks as to the quality of food sold.[5] Such juries are perhaps the ancestors of the modern special jury and the modern expert witness. They partake of the character of both. That juries could still decide of their own knowledge in the 17th century is attested by Vaughan, C.J., in *Bushell's* case.[6] It is in fact one of the main supports of his argument that jurors cannot be fined for finding a verdict contrary to the direction of the court. Hale[7] writing a little later says: "It may so fall out, that the jury upon their own knowledge may know a thing to be false that a witness swore to be true; or may know a witness to be incompetent or incredible, though nothing be objected against him; and may give their verdict accordingly." How a jury came by its knowledge was not originally a matter with which the law concerned itself. Just as the law neglected to define the limits and rationale of judicial notice,[8] so it neglected to examine the methods employed and the material used to form a verdict.

At the same time it was perfectly clear that verdicts were not as a rule founded on first hand knowledge. "Even in the early years of the 13th century they were not, and were hardly supposed to be, eye-witnesses."[9] We get at different periods various methods of informing the jury. (*a*) In cases where there is a dispute as to the genuineness of a deed the jury and the witnesses to the deed are summoned together. We can see a confusion between the old trial by witnesses and

[1] Stephen, Digest of the Law of Evidence, 197. [2] ff. 185 b, 325.
[3] ii 87. The fact that the jury could always demand a view of the premises in an assize illustrates the fact that they were expected to inform themselves.
[4] Bracton f. 185 b.
[5] Cases cited by Thayer, Evidence, 94. As to the jury de medietate linguæ, see 27 Edward III. St. 2 c. 8; 28 Edward III. c. 13.
[6] Vaughan's Rep. 147-149. [7] Common Law 348.
[8] Prof. Thayer says (Evidence 279) that it was not till 1824, when Starkie wrote, that any special mention of this subject occurs.
[9] P. and M. ii 626.

the modern jury when the parties put themselves upon the witnesses and a jury.[1] The growing difference between the jury and the ordinary witness caused the cessation of this practice. Coke[2] tells us that if a witness named in the deed be returned of the jury it is a good cause of challenge. (*b*) The practice of delivering deeds or charters to the jury is of old standing. "These things, *par excellence*, used to be known as 'evidence.'"[3] It was settled in 1361 that they must be produced in open court and not delivered privately to the jury.[4] (*c*) The counsel for each party opened and explained his case to the jury. It was not, however, for a considerable period that the practice of relying on the sworn testimony of witnesses became general. For this reason much evidence was allowed to be pleaded. It was then on the record. The jury were more likely to notice it than if it were merely stated by judge or counsel.[5] We can see from Fortescue's account of the jury that the witnesses hold a subordinate place as compared with the knowledge of the jury, and the statements of judge and counsel.[6] Professor Thayer has shown that to give evidence was in the 14th and 15th century a dangerous thing.[7] Apart from the risk of physical violence, the witness laid himself open to proceedings for maintenance or conspiracy. Thus in 1450 Fortescue, C.J., is reported as saying,[8] "If a man be at the bar and say to the court that he is for the defendant or plaintiff, that he knows the truth of the issue, and prays that he may be examined by the court to tell the truth to the jury, and the court asks him to tell it, and at the request of the court he says what he can in the matter, it is justifiable maintenance. But if he had come to the bar out of his own head, and spoken for one or the other, it is maintenance and he will be punished for it. And if the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable; but if he comes to the jurors, or labours to inform them of the truth it is maintenance, and he will be punished for it; so Fortescue said, and it was admitted by the court." This shows, both

[1] Fortescue, De Laudibus, c. 32; Thayer, Evidence, 97-100; 102, 104.
[2] Co. Litt. 157. [3] Thayer, Evidence, 104. [4] Ibid 110, 111.
[5] Ibid 114, 115. "Often we find the courts allowing one to set forth his case fully, 'for fear of the layman,' i.e., in order that the jury may not pass upon questions of law, and might not go wrong through any misapprehension of the facts." For "the demurrer to the evidence"—an expedient for withdrawing the case from the jury, see Reeves, H.E.L. iii 304 n. a, and Thayer, Evidence, 234-239. [6] De Laudibus c. c. 25, 26. [7] Evidence 124-129.
[8] Y.B. 28 Hy. VI. 6, 1 (cited Thayer, Evidence, 128, 129).

that the jurors were expected to make their own enquiries, and that the law discouraged the volunteer witness. However it is clear that when Sir Thomas Smith wrote witnesses held a far more important place than they held in the time of Fortescue.[1] In fact during the Tudor period the tide had turned in favour of the witness. He was a person to be encouraged rather than intimidated—at any rate when he was a witness for the crown. This is illustrated by the reluctance of the court of Star Chamber to punish such witnesses for perjury.[2] When once witnesses for the crown had been encouraged to come forward in this way, it is easy to see how the practice of calling them in all classes of cases became general. Coke admits that juries are most commonly led by the depositions of witnesses.[3] But we may perhaps see, at once a survival of the old theories, and a reminiscence of the way in which they had become modified, in the rule, disputed by Coke,[4] that no witnesses can be called for the prisoner in cases of treason or felony; and in the rule, which lasted to the end of the 17th century,[5] that the witnesses for the prisoner in such cases could not be sworn. Vaughan, C.J., too, could say in 1670 that "the evidence in court is not binding evidence to a jury."[6] But these were survivals. By the middle of the 17th century the witnesses and the jury were regarded as so distinct that "it was said by the court that if either of the parties to a trial desire that a juror may give evidence of something of his own knowledge to the rest of the jurors, that the court will examine him openly in court upon his oath, and he ought not to be examined in private by his

[1] Republic 147, 148. "Witnesses be sworn and heard before them, not after the fashion of the civil law, but so that not only the twelve, but the judges, the parties, and so many as be present may hear what each witness doth say. The adverse party or his advocates . . . interrogateth sometimes the witnesses and driveth them out of countenance."

[2] Hudson (Treatise on the Star Chamber 77, 81), cited Stephen, H.C.L. iii 247, says, "A long debated question hath been whether perjury committed by any witnesses upon indictments for the king shall be examined and punished in the Star Chamber. And the reason yielded hath been for that it will deter the king's witnesses to yield their testimonies in all cases." He notes that it had been at last decided that they could be so punished. But not "*perjury committed against the life of a man for felony or murder*," when the prisoner has been convicted; "and one reason is lest it should deter men from giving evidence for the king." These doctrines would form an appropriate motto for an edition of the State Trials of the period.

[3] 3rd Instit. 163.

[4] Ibid 79. The practice of allowing the accused to call witnesses sprang up at the beginning of the 17th century, Thayer, Evidence 160, n.

[5] Treason, 7 Will. III. c. 3 § 1: Felony, 1 Anne St. 2 c. 9 § 3.

[6] Bushell's case, Vaughan's Rep. 152.

companions."[1] In 1816 it seems to have been assumed that if a judge had directed a jury to find a verdict of their own knowledge a new trial might have been granted.[2]

The process was assisted by the growth of the law as to the persons to whom the parties may object as jurors.

We have seen that the prisoner might object to the presence of the "indictors" on the petty jury.[3] The fact also that a juryman was a villein was a cause of challenge. Both Fortescue[4] and Coke[5] give numerous cases in which persons could challenge jurymen. It is clear that the challenges "propter defectum," i.e. for some defect in capacity, as villein tenure; "propter affectum," i.e. for partiality; or "propter delictum," i.e. on account of conviction for certain offences, are based upon the judicial character of the jury. In fact in the 14th century witnesses are distinguished from the jury on these lines. A witness may be under age; and a witness cannot be challenged.[6] The manner in which these challenges were tried was by the sworn evidence of the persons challenged. "This," as Professor Thayer says, "may well have been a provocation to the same thing in the regular jury trial."[7] In other cases the law has been developed by giving a wider extension to rules made in the first instance merely to assist the procedure of the Court.[8]

iii. Methods of controlling the jury

When the character of the jury as witnesses was more prominent than their character as judges they were clearly guilty of perjury if they gave a false verdict. The party aggrieved could, by the favour of the crown, get a writ of attaint. The question whether the first jury was guilty of perjury was then tried by the attaint or grand jury. It was 24 in number and usually consisted of knights. If the first jury was convicted, they were imprisoned for a year, forfeited

[1] Bennet v. Hundred of Hartford (1650) Styles 233; so Salk. 405 (1702) "If a jury give a verdict of their own knowledge they ought to tell the court so that they may be sworn as witnesses . . . the fair way is to tell the court before they are sworn that they have evidence to give."

[2] R. v. Sutton, 4 M. and S. 532.

[3] Above 155.

[4] De Laudibus c. 27.

[5] Co. Litt. 156-158. Cf. Bl. Com. iii 359-364. To avoid inconveniences caused by challenges cases were removed into the King's Court as it could summon juries from any part of the county, Reeves, H.E.L. i 348 n. a.

[6] Thayer, Evidence, 100, 101.

[7] Ibid 123, 124.

[8] Thus the perjury of a juror was the only perjury known to the law till a statute of Elizabeth extended it to witnesses (Stephen, H.C.L. i 307); so the only form of forgery known till 1 Henry V. c. 3 was "the reliance on a false document in a court of law." It is not till 5 Eliza. c. 14 that the making and use of such false documents for general fraudulent purposes begins to be dealt with (P. and M. ii 539). See above 97, 98, as to the writ of Habeas Corpus.

their goods, became infamous, their wives and children were turned out, and their lands laid waste. It came to be the rule that the attaint jury must only have before it the evidence upon which the first jury founded their verdict. But the first jury were able to produce new evidence in their defence.[1]

We do not know exactly when or how the attaint arose. There is no mention of it in Glanvil; but it appears in the records of the King's Court in 1202;[2] and is discussed at some length by Bracton.[3]

Its scope was originally limited to the possessory assizes. It did not extend to the grand assize. Questions once settled in that manner could not be reopened; and a similar punishment had been provided for those who swore falsely on this assize.[4] It did not extend to the jurata.[5] It was the party's own fault if he had consented to submit his case to such unworthy persons. He must abide by the result of the test which he has chosen. But its scope was extended by statute. In 1275[6] it was extended to all juries in real actions, whether proceeding as an assize or as a jury. But the king was given a discretion as to the grant of the writ. In 1326[7] it was extended to cases of trespass, and without the special order of the king. The scope of this statute was enlarged in 1331 and 1354.[8] In 1360 it was allowed in all classes of cases.[9]

The writ of attaint can never have been a very effective remedy. The consequences of a conviction were heavy.[10] Bracton distinguishes cases where the verdict is merely fatuous, and where the jury have sworn falsely.[11] In his day apparently the punishment might be modified to suit varying

[1] Bl. Comm. iii 402-404. Its issue seems to have been at first a matter of royal favour for which the applicant must pay, Thayer, Evidence, 143. This is illustrated by the words of 34 Edward III. c. 7 extending the scope of attaint. The poor are to have the writ without payment.

[2] Sel. Civil Pleas (S.S.) no. 216.

[3] 288 b-292 b; Reeves, H.E.L. i 377-381. [4] Glanvil ii 19.

[5] Bracton ff. 289 b, 290, "Si autem querens se ponere voluerit in juratam, denegabitur actio, in quo casu propter consensum non erit locus omnino convictioni." P. and M. ii 620, 621.

[6] 3 Edward I. (Stat. West. I.) c. 38. See Thayer, Evidence, 146 n. 4, and Reeves, H.E.L. ii 33, 34. [7] 1 Edward III. c. 6.

[8] 5 Edward III. c. 7; 28 Edward III. c. 8.

[9] 34 Edward III. c. 7. It is not certain whether it lay in criminal cases. Bracton, f. 290 b, and Hale, 2 P.C. 310, say it did if the case went against the king; Vaughan, C.J., in Bushell's case, at p. 146, denied it. See Thayer, Evidence, 156 and n. 3; Hudson 72.

[10] Bracton f. 292 b; Bl. Comm. iii 403.

[11] f. 288 b. Thus in the case of an obscure verdict "locus erit potius certificationi quam convictioni ex tali causa, ut de incerto faciant certum." The jurors were summoned to Westminster to explain their verdict, P. and M. ii 662. Reeves, H.E.L. i 381.

degrees of guilt.[1] In later days the punishment became more severe and we do not read that the judge was left any discretion to modify it. However, Fortescue mentions it with approval as a necessary adjunct to a jury trial.[2] But in 1495, soon after he wrote, the penalty was modified. It was provided that a jury on conviction shall, if the amount at stake is of the value of £40, forfeit £20, and be fined at the discretion of the court, and be infamous. If it is under £40 they shall be fined £5.[3] After this date a person could either bring attaint at common law or under the statute.[4] But in 1565 Sir Thomas Smith says,[5] "Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeomen their neighbours; so that of long time they had rather pay a mean fine than to appear and make the inquest. And in the meantime they will entreat, so much as in them lyeth, the parties to come to some composition and agreement among themselves. . . . And, if the gentlemen do appear, gladlier they will confirm the first sentence for the causes which I have said, than go against it." In 1665, Hyde, C. J., declared it to be fruitless.[6] In 1757 Lord Mansfield declared it to be "a mere sound."[7] In 1825 it was abolished.[8]

The attaint had always been a clumsy remedy. The growing distinction between the jury and the witnesses rendered it an anachronism. Its place was taken by the device of fining or imprisoning jurors if, in the opinion of the court, they misbehaved themselves. We must, however, at the outset distinguish two different kinds of misbehaviour. This distinction we find most clearly drawn by Vaughan, C.J., in *Bushell's case*.[9] "Much of the office of jurors," he says, "in order to their verdict, is ministerial, as not withdrawing from their fellows after they are sworn, not withdrawing after

[1] f. 292 b, e.g. the case of those newly added to the assize, or those who before conviction have amended their finding. [2] De Laudibus c. 26.

[3] 11 Henry VII. c. 24; 23 Henry VIII. c. 3; 13 Eliza. c. 25.

[4] Bl. Comm. iii 404.

[5] Smith, Republic, 207. Cp. Hudson, Star Chamber, 14. "No jury having for many years attainted a former."

[6] 1 Keble 864. Blackstone (Comm. iii 404) says he has seen no instances later than the 16th century.

[7] Bright v. Egnon., 1 Burr. 393. [8] 6 Geo. IV. c. 50 § 60.

[9] Vaughan's Rep. at p. 152. "Preparing, labouring, or soliciting of jurors," is stated by Hudson to be one of the branches of the Star Chamber Jurisdiction 91, 92. It was evidently a common offence. At p. 123 he relates how "an extent had gone out against one Harvey; and the jury, being laboured could find no goods of Harvey's but an old barrel and a turkey-cock. And for this scorn the court ordered his majesty's attorney-general to put in an information against the jury."

challenge, and being tryed in, before they take their oath, not receiving from either side evidence, after their oath not given in court, not eating and drinking before their verdict, refusing to give a verdict, and the like; wherein if they transgress, they are finable; but the verdict itself, when given, is not an act ministerial, but judicial, and according to the best of their judgment, for which they are not finable, not to be punished, but by attaint."

In the 16th and early part of the 17th centuries juries were frequently punished by the court for judicial acts. It was chiefly the court of Star Chamber that exercised this jurisdiction; and in 1534 statutory authority was given to the practice in the case of the council of the Marches of Wales.[1] In *Throckmorton's Case* the acquittal of the prisoner was followed by the fining and imprisonment of the jury by order of the Star Chamber.[2] The practice is attested by Hudson[3] and Sir Thomas Smith. But the latter notices that "those doings were even then (1584) of many accounted very violent, tyrannical, and contrary to the liberty and custom of the realm of England."[4]

When the Star Chamber was abolished in 1640 the judges of the Common Law Courts considered that they could exercise this jurisdiction.[5] But in 1665, in a case where the jury had been fined for acquitting against the law, and contrary to the evidence, all the judges but one agreed,[6] "that this fine was not legally set upon the jury, for they are the judges of matters of fact, and although it was inserted in the fine that it was 'contra directionem curiæ in materia legis,' this mended not the matter, for it was impossible any matter of law could come in question till the matters of fact were settled, and stated, and agreed by the jury, and of such matters of fact they were the only competent judges." Notwithstanding this decision several later cases occurred in which the jury were fined for finding verdicts against the

[1] 26 Henry VIII. c. 4.

[2] (1554) 1 S.T. 869.

[3] Treatise on the Star Chamber 72. "In the reigns of Henry VII., Henry VIII., Queen Mary and the beginning of Queen Elizabeth's reign there was scarce one term pretermitted but some grand inquest or jury was fined for acquitting felons or murderers." Moore 730, 731 gives several precedents of such action on the part of the court of Wards.

[4] Republic 204. Compare a saying of Bacon's reported by Hyde, C.J. (Star Chamber Cases, C.S. 20). "If you shall meet with ignorant juries, your duty is to open their eyes, you may not lead them by the nose."

[5] Leach's case (1664) Th. Raym 98.

[6] Wagstaff's case, Hale, 2 P.C. 312, 313.

direction of the court.[1] In 1670 the decision of Vaughan, C.J., in *Bushell's case*[2] finally demonstrated the illegality and the illogical nature of the practice. The jury are the judges of the facts. "I would know," he asks, "whether anything be more common, than for two men students, barristers, or judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should infer distinct conclusions from the same testimony?[3] . . . A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude and infer the things to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least in foro conscientiæ."[4]

The court was now left with no apparent means of controlling the jury. The remedy was found in the growth of the practice of granting new trials.[5] Many of the arguments of Vaughan's judgment were, as Professor Thayer points out, applicable to this practice.[6] How can it be known that the verdict is irrational unless all the facts are found by the jury? How can it be known that the jury, in their capacity of witnesses, do not know more about the case than the court? Clearly some method of control was needed; and the answer to these objections is found in the fact that the jury were no longer witnesses but judges, and that all the evidence is before the court.[7]

The power of the court to discharge a jury which cannot agree may perhaps be said to be another indirect means of control. In the Doctor and Student it is said that the court has this power.[8] Coke[9] denied that the court had this power.

[1] Keyling's Rep. 50 (1666); R. v. Windham (1667) 2 Keble 180. In 1667 a committee of the House of Commons (of which Vaughan the future C.J. was a member) reported as to the restraints put on juries by Keyling, C.J. The House resolved that the practice of fining and imprisoning jurors was illegal. A Bill was introduced to declare this to be the law; but it was dropped (Hargrave's preface to Hale's Jurisdiction of the House of Lords xcviii n. y.). [2] Vaughan's Rep. 135.
[3] At p. 141. [4] At p. 148. [5] Above 90, 91. [6] Evidence 169.
[7] At the same time the personal knowledge of the jurors may sometimes assist matters. Judge Chalmers tells us of a jury who came to a speedy decision for the plaintiff in a doubtful case where there had been hard swearing on both sides. On his asking a juryman how they managed it, he replied, "I don't know the plaintiff, but the defendant is a friend of mine, and I know he is a d——d liar." L.Q.R. vii 17.
[8] Doctor and Student, Pt. 2 c. 52. If the jurors cannot agree, "I think that then justices may set such order in the matter as shall seem to them by their discretion to stand with reason and conscience by awarding of a new inquest, and by setting fine upon them that they shall find in default, or otherwise as they shall think best by their discretion, like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf." [9] 3rd Instit. 110.

But Hale[1] and Blackstone[2] recognise its existence. The question was put beyond doubt by the decision of the Court of Queen's Bench and Exchequer Chamber in *Winsor v. The Queen*.[3] Cockburn, C.J., showed that it was a power necessary to the proper working of the jury system. "It is very true," he says, "if jurymen have only doubts or weak convictions, they may yield to the stronger and more determined view of their fellows; but I hold it to be of the essence of a juryman's duty, if he has a firm and deeply rooted conviction, either in the affirmative or the negative of the issue he has to try, not to give up that conviction, although the majority may be against him, from any desire to purchase his freedom from confinement or constraint. . . . When, therefore, a reasonable time has elapsed, and the judge is perfectly convinced that the unanimity of the jury can only be obtained through the sacrifice of honest conscientious convictions, why is he to subject them to torture, to all the misery of men shut up without food, drink, or fire, so that the minority or possibly the majority, may give way, and purchase ease to themselves by a sacrifice of their consciences? I am of opinion that so far from the practice of thus discharging a jury being a mischievous one, it is one essential to the upholding of the pure, conscientious, and honest discharge of the duties of a juryman."[4]

iv. The legal and political effects of the jury system.

The defects of the jury system are obvious. They are twelve ordinary men—"a group just large enough to destroy even the appearance of individual responsibility."[5] They give no reasons for their verdict. The verdict itself is not subject to any appeal; and it is apt, in times of political excitement, to reflect the popular prejudice of the day. Experience shows that they are capable of intimidation.[6] It is said that they are always biassed when a pretty woman or a railway company happen to be litigants. Though a good special jury is admitted to be a very competent tribunal,[7] the common jury may be composed of persons who have neither the desire nor the capacity to

[1] Hale, 2 P.C. 294, 295.
[2] Bl. Comm. iv 360 (12th Ed.)
[3] L.R. 1 Q.B. 289, 390 (1866).
[4] At p. 306.
[5] Stephen, H.C.L. i 568.
[6] E.g. Ireland of the present day, England under the Plantagenets, at the time of the Popish Plot, at the end of the 18th century. See Reeves, H.C.L. ii 541 n. a.
[7] Ld. Campbell (Lives of the Chief Justices ii 407 n.) tells us that Ld. Mansfield "reared a body of special jurymen at Guildhall who were generally returned on all commercial causes to be tried there." Ld. Mansfield was on terms of

weigh the evidence, or to arrive at a conclusion upon the facts in issue.

In spite of these obvious defects, distinguished judges, who have spent many years working with juries, have combined to praise the jury system. Fortescue, Coke, Hale, Blackstone, and Stephen are witnesses whose evidence should be conclusive. We may add to these names that of Judge Chalmers, whose experience in the new county courts leads him to the same conclusion.

In fact we may say that the jury system works well from both the litigant's and the lawyer's point of view.

The litigant gets a body of persons who bring to bear upon the facts of his case average common sense. They may sometimes even assist him by their special knowledge. "A jury," says Judge Chalmers,[1] "is a far better tribunal than a judge for dealing with questions of fact. The more I see of juries the higher is the respect which I have for their decisions. . . . They have a marvellous faculty for scenting out a fraud." Their findings create no precedent. They can decide hard cases equitably without making bad law. Litigants are contented with the quality of justice dispensed by the courts; and this is no small gain to a legal system.

The beneficial effects of the jury system upon the common law itself are experienced by both litigant and lawyer. The jury system tends to make the law intelligible. It tends to keep it in touch with the common facts of life.

If a clever man is left to decide by himself disputed questions of fact he is usually not content to simply decide each case as it arises. He constructs theories for the decision of analogous cases. These theories are discussed, doubted, or developed by other clever men when such cases come before them. The interest is apt to centre, not in the dry task of deciding the case before the court, but rather in the construction of new theories, the reconciliation of conflicting cases, the demolition or criticism of older views. The result is a series of carefully constructed, and periodically considered rules, which merely retard the attainment of a conclusion without assisting in its formation.[2] It is only the

familiar intercourse with them. "Several survived," says Ld. Campbell, "when I began to attend Guildhall as a student, and were designated and honoured as Ld. Mansfield's jurymen." It was through their assistance that Ld. Mansfield earned the title of the founder of the commercial law of this country.

[1] L.Q.R. iii 10, 11.

[2] An instance is afforded by § 29. 4 of the Sale of Goods Act 1893, which makes the question whether demand or tender of delivery has been made at a

## CHAPTER IV

## THE HOUSE OF LORDS

THE history of the origin and the constitution of the House of Lords is a matter for the constitutional historian. Legal history is concerned with the jurisdiction of the House of Lords and with its relation to the other courts. We have seen that down to the reign of John the Curia Regis possessed legislative, executive, and judicial powers. We have seen that its size varied according to the nature of the occasion on which it was summoned; that it generally consisted of a small body of professional advisers, sometimes of a much larger body of tenants in chief.[1] The movement which led to the granting of Magna Carta altered the whole position of the Curia Regis. The victory of the barons meant that the king was no longer practically absolute. Magna Carta provided for a commune concilium, the assent of which was necessary for taxation.[2] It was clear that the nation had both the desire and the power to exercise some sort of control upon the government. In the question what form the controlling body should take, the main constitutional interest of the reigns of Henry III. and Edward I. is centered. From the various experiments tried during that period there is evolved the Model Parliament of 1295.[3] It is far from being a purely feudal assembly based upon tenure, like the commune concilium of Magna Carta. Elective and representative principles—familiar already in local government—find a place beside feudal principles. From the union of the elective and representative, and the feudal principles, we get in time our modern Parliament—the House of Lords and the House of Commons.

Bracton, writing in Henry III.'s reign, hardly mentions this new body. He knows the King's Bench and the Common Bench;[4] he knows also a commune concilium, the authority

[1] Above 28. [2] c. 14. [3] Stubbs, Sel. Ch. 482-486.

[4] f. 108. "Item justitiariorum, quidam sunt capitales, generales perpetui et majores a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores. Sunt etiam alii perpetui, certo loco residentes, sicut in banco, loquelas omnes de quibus habent warrantum terminantes."

of which is needed for the issue of new original writs.[1] The King's Bench is still the highest court. Fleta,[2] writing a little later, knows a court higher than the King's Bench—the Parliament. "Habet enim Rex curiam suam in concilio suo, in Parliamentis suis, præsentibus prelatis, comitibus, baronibus, proceribus et aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, et novis injuriis emersis nova constituuntur remedia, et unicuique justitia, prout meruit, retribuetur ibidem." His words are large and vague—larger and more vague than those in which he describes the constitution of older and more settled courts. But if we look at one of our earliest printed Parliament Rolls we shall see that large and vague words are needed to describe the facts.

The Roll of 1305[3] contains the arrangements made for the receipt of petitions, the petitions themselves—English, Scotch, and Irish—and the law suits there decided. The Roll itself is, perhaps incomplete.[4] It consists of detached membranes which are, as a rule, expressly dated.[5]

It raises many interesting questions as to the constitution of the Parliaments of the 13th and 14th centuries. (1) What does the term Parliament mean? A parliament is rather a discussion or a colloquy than a body of persons. "It is but slowly," says Professor Maitland,[6] "that this word is appropriated to colloquies of a particular kind, namely, those which the king has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the king has summoned. As yet any meeting of the king's council that has been solemnly summoned for general business seems to be a parliament." It seems to be a large meeting of the King's Council afforced by elected representatives from the counties and boroughs. The petitions are presented "at" the parliament to the king and Council. The Council is the "core and essence" of the parliament.[7] (2) What is the nature of the King's Council? This is a difficult question.[8] Probably the working body of the Council consisted of the king's great officers of state and the judges. It is not easy to say how many more persons may have been added to the Council on any particular

[1] f. 413 b. "Et sunt quædam brevia formata semper certis casibus, de cursu et de communi concilio totius regni concessa et approbata, quæ quidam nullatenus mutari poterint absque consensu et voluntate eorum." [2] II. 2. 1.
[3] Edited by Maitland for the Rolls Series. [4] Introd. xxii-xxv.
[5] Ibid xv-xviii. [6] Ibid lxvii.
[7] For a latter instance (1429) of the use of the term Parliament to mean a great council or general assembly of the Lords Spiritual and Temporal, see Nicolas, Privy Council iii, *lxii*. [8] Parliament Roll xxxvi-xlvii. Below chap. vi.

occasion. In later history we meet with many bodies called by the name of Council to which the epithets "magnum" or "ordinarium" are added.[1] These are sometimes small bodies of professional advisers, sometimes they consist of these advisers and the whole House of Lords. A distinct court like the court of King's Bench has a distinct style. Nothing illustrates better the fluctuating and indistinct character of the Council better than the fact that it has no such distinct style. "The styles," says Hale,[2] "of the consilium ordinarium, and of the great court of Parliament consisting of the king, lords, and commons, and of the lords' house, are so variously and promiscuously used, that it causeth great difficulty in determining whether the proceedings be in the one or the other . . . it is necessary in such cases to observe the whole record, and the nature of the business so transacted, and the whole circumstances of the case, and the constant interpretation, acceptance and usage of succeeding times, to give a true conclusion whether the things were transacted and assented to by both Houses, or only by the lords' house, or the consilium ordinarium." (3) What does the King's Council do at a Parliament? Business of state is transacted, and there will sometimes be taxation and legislation.[3] But it is to two other functions that we must look for some of the origins of the later jurisdiction of the House of Lords. (i) It hears important cases.[4] It is not merely a court of appeal. It exercises original jurisdiction. It is not tied down by the technical rules which are beginning to fetter the two benches. Like the Curia Regis of Henry II.'s time it can administer a species of equity because it is a supreme court. Why any particular case should be heard in Parliament rather than elsewhere is not clear. All that can be said is that "the causes heard in Parliament are important causes, important because they concern the king, or because they concern very great men, or because they involve grave questions of public law, or because they are unprecedented."[5] Most of these cases are determined by the Council; some after the estates have been dismissed. All, however, are regarded as being determined by the Council in Parliament. (ii) It answers petitions. The writ appointing the receivers of petitions

[1] Hale, Jurisdiction of the House of Lords, 23, 70-73. [2] Ibid chap. iii.
[3] Parliament Roll xlviii-liv.
[4] Such cases are those of Nicholas Segrave (no. 449); a suit as to tallage between the citizens of Salisbury and the Bishop (no. 451); proceedings in consequence of riots at Oxford (nos. 452, 453); proceedings against the citizens of Winchester for an escape (no. 456). [5] Maitland, Parliament Roll, lxxxv.

stands at the head of the roll. The roll itself shows that it is the answering of petitions which is its chief duty. Two earlier ordinances of the 8th[1] and 21st[2] years of the reign show that their number was so great that it was necessary to make arrangements for their classification. The petitions are of varied kinds. They come chiefly from individuals and communities. Some ask for things which the petitioners can get by an action at law. These will be sent to the ordinary courts. Sometimes they ask favours of the king. Sometimes they ask for relief which no known writ can give. Sometimes they will ask for new legislation. All these petitions come before the Council who, perhaps, examine the petitioner. It will then either endorse an answer which sends the petition to one of the ordinary courts, or it will lay the matter before the king.[3] In the answers we "very rarely find anything in point of decision or judicature"; we usually find only "a recommendation to those proper courts, persons, or places where they (the petitions) were naturally and legally determinable." They are a council of "advice, preparation, and direction," rather than a council of "jurisdiction or decision."[4] In later days some of these petitions will be addressed directly to the Chancellor; others will, if assented to by the king and both houses, become statutes; others will be dealt with by the King in Council. But the time has not yet come when the functions of Parliament, the court of Chancery, and the Council, can be clearly distinguished. In the meantime the Council in Parliament is doing just what Fleta describes it as doing. It is providing new remedies for new wrongs. It is distributing justice according to each man's deserts.

The absence of any continuous set of rolls, like the rolls of the two benches, makes the position of the Council and the Parliament very obscure. The fact of their absence, how-

[1] Ryley, Placita, 442; Stubbs, C.H. ii 286 n. Because of the inconvenience caused by the large mass of petitions it is provided that, "all the petitions which touch the seal come first to the Chancellor, those that touch the Exchequer to the Exchequer, those that touch the justices and the law of the land to the justices, those that touch the Jewry to the justices of the Jewry. If the requests be so great or so much of grace that the chancellor and the others cannot grant them without the king, then they shall carry them with their own hands to the king to know his will. . . . Thus the king and his council without burden of other business can attend to the important business of his realm and of foreign lands." See Reeves, H.E.L. ii 289, 290. [2] Ryley 459, receivers of petitions are appointed.

[3] Parliament Roll lx-lxiv. Prof. Maitland thinks that "the entries on the roll stand to the endorsed petitions in the relation of copies to original documents." [4] Hale, Jurisdiction of the House of Lords, 25.

ever, shows that they are as yet ill-defined bodies. In later times we get, according to Hale's conjecture,[1] Parliament rolls on which are entered all petitions received by the House of Lords, and all petitions of the commons assented to by the Lords. We get the statute roll on which are entered all the petitions assented to by king, lords, and commons. We get in bundles various petitions with the answers endorsed thereon which were received by the Council or the auditors of petitions, but not brought before the House of Lords. We must not expect this classification in 1305.

In the course of the 14th and 15th centuries three main causes were at work which tended to separate the Council from the Parliament, and to vest in the House of Lords its peculiar jurisdiction.

(1) The functions of government tend to become specialized. We get the more definite system of enrolment described above from Edward III.'s reign. We shall see that the growth of the Chancellor's equitable jurisdiction provided a remedy for many cases which must formerly have come before Parliament.[2] The Council was tending to become an executive body. It acquires a separate body of rolls in Richard II.'s reign.[3] We shall see that it maintained a certain jurisdiction, but that it was not a popular jurisdiction.[4] It tends to become a jurisdiction quite apart from the system of the common law.[5] Much of the work of preparing and classifying the petitions was turned over in Edward III.'s reign to auditors of petitions. As early as Edward II.'s reign we read of persons appointed not merely to receive petitions, but to hear, to answer, or to try them.[6] In fact, after 28 Edward III., they are often called "triers." Hale says[7] that they "did answer private petitions in Parliament, and supplied the place of the concilium ordinarium and eased them, and the businesses that came before them was, for the most part, in relation to suits at law and injuries." For this reason they were usually judges or some other of the professional members of the Council. "But

[1] Jurisdiction of the House of Lords 64, 65. But, he says, the records are "very dark and obscure." Parliament Roll lxiv, lxv. [2] Below 197, 201.
[3] Pike, II. of L. 46. [4] Below 266-269.
[5] Y.B. 39 Edward III. Pasch. 14. The council reversed a judgment of the Common Bench "Mes les justices ne pristerent nul regard al reverser devant la consel, pur ce que ce ne fuit place ou jugement pourroit estre reverse."
[6] Hale, Jurisdiction of the House of Lords, chap. xii. Fleta describes them as the king's ministers with power, not "terminare" but "regi deferre," II. 2, 4. [7] Jurisdiction of the House of Lords 77-79.

as the grandeur of the lords prevailed, so by degrees the power of the auditors and the consilium decayed." Their appointment became a mere formality as their work was transferred to committees of the House. It was not, however, till 1886 that the formality of appointing them was dropped.[1]

(2) The powers of Parliament in the 14th and 15th centuries were constantly increasing. It was from the Parliamentary records of that period that the statesmen of the 17th century drew the precedents in support of their opposition to the claims made on behalf of the prerogative of the crown. It becomes possible to distinguish the various powers possessed by Parliament and the various powers possessed by each house of Parliament.[2] The lords' house had always had a close connection with the Council. The Council—consisting largely of judges and other professional advisers of the crown—had generally done most of the judicial work of Parliament. It was probably for this reason that the term Parliament when applied to judicial business came to mean the House of Lords. There are precedents, no doubt, in which the commons interfered in what we should call judicial business. But some of these cases later lawyers would perhaps deem rather legislative than judicial. They would consider them decisions reversed not on appeal but by an act of the legislature.[3] We shall see that in early law attainders and impeachments are apt to shade off into one another.[4] The style of court which reversed decisions of the inferior courts shows that in the matter of judicature the

[1] Anson, Parliament 344.

[2] For a summary see Taswell-Langmead's Constitutional History, chaps. viii and ix.

[3] Hale considered that the right of the commons to share in the judicial functions of the lords, though "much disused," was still a subsisting right. He cites the cases of the Bishop of Hereford and Thomas of Lancaster at the beginning of Edward III.'s reign. In both the judgment was reversed by the whole Parliament (chap. xxii). He also cites (chap. xvi) the case of the Earl of Salisbury (R.P. iv 17 and 18) who assigned for error that the judgment against him was "Saunz petition ou assent des communes en le dit parlement queux de droit serront peticioners ou assentours de ceo que serra ordeine *pur ley* en parlement." It is clear (1) that these cases are political (2) that judicial and legislative powers are confused. In 1305 Segrave's case was determined by the "counts, barons, magnates and others of the council" (Parlt. Roll (R.S.) 257). The other cases were disposed of by the council. Hale also produces a writ of error from Rastell's entries (f. 302, Ed. 1670) in which perhaps the presence of the "communitas" is mentioned. The reading is doubtful. But 1 Henry VII. Y.B. Pasch. pl. 5, the judges agreed that the commons had no voice. (See Pike, H. of L. 290, 291, 294, n. 2.) If the commons ever had a voice it was in political cases before the practice of Parliament with respect to judicature was settled. See instances Coke, 4th Instit. 23.

[4] Below 190.

lords' house is gaining a monopoly. After Richard II.'s reign petitions of error are most usually addressed "al roy et al nobles," or "al nobles seigneurs en parlement." After Henry IV.'s reign the proceedings are "coram nobis prelatis et proceribus in Parliamento."[1] In fact the commons did not desire to be burdened with the duty of judicature. In dealing with the courts of the Middle Ages we must, as Professor Maitland says, "put duty in the first line, right in the second."[2] In Henry IV.'s reign it was declared that judgments in Parliament belonged only to the king and to the lords and not to the commons. The king, in his answer, allowed that the commons were but petitioners, save that in respect of legislation, taxation, and other such things for the profit of the realm they might be asked for their advice and assent.[3]

The jurisdiction which the House of Lords assumed tends naturally to become a jurisdiction in error not an original jurisdiction. We find many petitions in which the petitioner is told to pursue his remedy at common law.[4] We find that the House is beginning to recognise a distinction between the judicial and the legislative power. The reply to some petitioners is "non est lex ordinata."[5] In Edward III.'s reign all the judges in Parliament stated that error in the Common Bench ought to be amended in the King's Bench, and should not be brought immediately into Parliament.[6] This presupposes that original jurisdiction is for the most part in the ordinary Courts of Common Law. We can thus see that Parliament is beginning to assume an independent

[1] Hale, Jurisdiction of the House of Lords, 138, 142. But the council assist and guide the decision, ibid 59, 60. [2] Maitland, Parliament Roll, lxxxvi.

[3] R.P. 1 Henry IV. n. 79 (iii 427). The declaration was taken in Charles II.'s reign to apply to all the jurisdiction of the lords. The actual words are "que nul record soit fait en Parlement encontre les ditz Communes qu'ils sont ou serront parties as ascunes juggementz donez ou as doner en apres en Parlement." They apply more directly to appeals of crime in Parliament which had used in Richard II.'s reign for political purposes (below 189) and against which an act was passed in the same year as this declaration was made. In 1421 R.P. 8 Henry V. n. 23 (R.P. iv 127) the commons petitioned that if any indorsed his bill or petition with the words "by authority of Parliament let this bill or petition be sent to the council . . . or to the Chancellor . . . to examine and determine," and if the bill had not been assented to by the commons, such person should be punished for disobeying the law. The king returned a negative answer.

[4] Ryley 43 (18 Ed. I.). The following is the statement of one of the parties to which the lords assent. "Nec est juri consonum vel hactenus in curia ista usitatum, quod aliquis sine lege communi et brevi de cancellaria de libero tenemento suo respondeat, et maxime in casu ubi breve de cancellaria locum habere possit." See R.P. 13 Richard II. n. 10 (iii 258).

[5] Ryley 409 (14 Ed. II.). Hale, Jurisdiction of the House of Lords, 108 and 110. [6] R.P. 50 Edward III. n. 48 (ii 330).

jurisdiction. We can see that this jurisdiction is being assumed by the House of Lords, and that its character is mainly that of a jurisdiction in error. At the same time the old connection of Parliament with the council still survives. "In the great court of Parliament," says Hale, "at least the figure and model of the consilium regis and the persons whereof it consisted is to this day preserved in the lords' house in Parliament. For thither are summoned the great officers, whether they are peers or not; as the chancellor, treasurer, privy seal, secretaries of state, judges, barons of the exchequer, masters of chancery, king's serjeant and attorney, the treasurer of the household, steward and chamberlain of the household, and most if not all the king's privy council."[1] But they are no longer the "core and essence" of the Parliament. They are summoned merely by writs of assistance.

(3) During these centuries the idea of the Peerage as a special and an honourable status was gaining ground. Magna Carta had provided that a man was to be judged by his peers.[2] Many meanings have been assigned to this clause. It is in the right of peers accused of treason or felony to be tried by their peers that we get one of its original meanings, and its latest survival.[3] In Edward III.'s reign (1330) Simon de Bereford, a commoner, was tried before the Lords; but they protested that this case was to form no precedent, as they were not bound to give judgment upon other than peers.[4] In 1341 an act was passed defining the cases in which peers could demand judgment of their peers in very wide terms. The act was shortly afterwards repealed, and the law was left as before.[5] In Henry VI.'s reign the privilege of trial by peers was extended to peeresses.[6] Magna Carta alone is cited as the authority for trial by peers, and it is clear from the statute that the privilege extends only to treason or felony.

[1] Hale, Jurisdiction of the House of Lords, 58, 59. [2] § 39 (1215).

[3] Hale even says (Jurisdiction of the House of Lords 88) that such a trial is merely by "examination of witnesses," and that "the party has lost that trial that the law of the land and Magna Carta so much assert, the legale judicium parium suorum," so completely had trial by jury become identified with this clause.

[4] R.P. ii 53 n. 26; Stephen, H.C.L. i 163, 164. This case was in 1681 illogically made a precedent for refusing to try a commoner *impeached* of treason or felony; Case of Fitz-Harris 8 S.T. 223; Bl. Comm. iv 256, 257.

[5] Pike, H. of L. 194-197. The Chancellor, Treasurer, and justices dissented from the act, and the King declared it void, Rymer, Fœdera, v 282. Afterwards it was regularly repealed, R.P. (ii 139) 17 Edward III. n. 23.

[6] 20 Henry VI. c. 9.

This privilege made the class of peers a very distinct class. The question remained who were peers. The Earl was from the first an honourable official. It was always a name of dignity.[1] The first Duke was the Black Prince. "His dukedom in fact was only a superior kind of earldom." Marquis and Viscount were foreign terms introduced at a still later period.[2] The Baron was never a dignified official.[3] It originally signified the tenure of a certain estate rated as a barony. Until the middle of Edward III.'s reign the summonses of barons to Parliament were quite capricious. The first creation of a baron by letters patent was in Richard II.'s reign.[4] It is not till about that time that a barony begins to be regarded as a dignity, and for a long period it is not quite clear how far a barony represents property, how far it represents dignity. We are reminded of the conflict between property and jurisdiction which we found in the manor. But with the abolition of tenure by military service barony of tenure lost its meaning. The barony becomes a dignity simply; and the baron takes rank as a peer.[5]

The case of the Spiritual Lords is more difficult. That they were held to be barons in the Middle Ages is clear.[6] But they could not take part in a sentence of death.[7] They did not claim to be tried by their peers because they denied their liability to be tried by laymen.[8] Thus they did not share what had come to be the distinctive mark of the peerage. In Henry VIII.'s reign the abbot of Tavistock is termed a Spiritual Lord of Parliament; and this is the position which they have finally assumed.[9] It is true that they possess all the other privileges of the peerage; and these in former days were numerous.[10] It might perhaps have been more in accord with history to have concluded with Selden

[1] Pike, H. of L. chap. v.
[2] Ibid 348.
[3] Ibid chaps. vi, vii.
[4] John de Beauchamp created Baron of Kidderminster 1387, ibid 110, 111.
[5] Pike, H. of L. 129-131. In 1669 barony by tenure was declared obsolete. Cp. the Berkeley Peerage Case (1861), Anson, Parliament, 193-196.
[6] Selden, Privileges of the Baronage (Works iii 1537-1539); Pike, H. of L. 160, 161; Phillimore, Eccl. Law (Ed. 1895) 60-62.
[7] In Edward IV.'s time Littleton thought that they could appoint a Procurator. Pike, H. of L. 218; Coke, 3rd Instit. 31.
[8] They were tried by jury in the ordinary way; Bp. of Coventry (1307); Bp. of Hereford (1324); Bp. of Carlisle (1401); Bp. of Rochester (1574); Archbp. Cranmer (1553).
[9] Pike, H. of L. 163, 164.
[10] Selden loc. cit. 1533-1586. Instances are:—If a peer is a party a knight must be on the jury till 1751; freedom from arrest in civil actions; clergy; letters missive were sent them by the Chancellor instead of a writ of subpœna.

that they were peers but not to be tried as the temporal lords by their peers. But it is this trial by peers that the law has singled out as the test of peerage; and with this test they cannot comply.

The old connection of the House of Lords with the Council, the growth of the powers of Parliament in the 14th and 15th centuries, the idea of peerage, are the causes which underlie the various species of jurisdiction possessed by the House of Lords. The weakness of Parliament under the Tudors left the boundaries of that jurisdiction very ill defined. The conflict between the crown and Parliament under the earlier Stuarts gave no opportunities for its final settlement. This was the work of the later 17th and earlier 18th centuries. This process we must now trace in detail.

We can divide the various species of jurisdiction possessed by the House of Lords as follows:—

(1) Civil jurisdiction.
(2) Criminal jurisdiction.
(3) Jurisdiction in cases of privilege.

(1) *Civil jurisdiction.*

Civil jurisdiction falls under two heads. It is either original jurisdiction or it arises from some proceedings pending or decided in the lower courts.

*Original jurisdiction.*—We have seen that in Edward I.'s reign the jurisdiction exercised by Parliament was as often original as not; but that in the 14th and 15th centuries there was a growing tendency not to exercise such jurisdiction. At the same time there are precedents of cases heard originally by the Lords. If the king's interest was specially concerned he would commission the Lords to hear the case. Thus petitions of right and monstrans de droit, cases of lunacy, cases where, owing to the turbulence and strength of one of the parties, justice could not be got in the ordinary courts, were heard by the Lords in this way.[1] During the Tudor period many of these cases were dealt with by the Council. There are no precedents for the exercise of any sort of original jurisdiction by the Lords during that period. In 1621 there are three cases in which they assumed such jurisdiction.[2] In that year Selden had been commissioned by a committee of the Lords to draw up an account of the privileges of the peers.[3] His work is based upon old records taken from a time when the constitution of Parliament was

[1] Hale, Jurisdiction of the House of Lords, 104.
[2] Ibid (Hargrave's Preface) xxii.
[3] Ibid xxix-xxxi.

not fixed. The records could be made to justify any pretension of the Lords. But, being merely statements of facts occurring at a time when there were no rules upon the subject, they could equally well serve the purposes of those who opposed these pretensions. They were interpreted by the Lords as giving them the widest jurisdiction. In 1626 they entertained the petition of a private person with reference to riots which had taken place at Banbury. Other cases were depending before them when the Parliament was dissolved.[1] They entertained many such cases during the Long Parliament. But, as Hale justly observes, this is hardly a time from which precedents could be safely drawn. The cases of Lilburne (1646) and of Maynard (1647) produced a controversy on the subject.[2] Prynne published a book entitled "A Plea for the Lords and House of Peers," in which he asserted the jurisdiction in the widest terms. The influence of the book is evident from the proceedings of the Lords in the Convention Parliament. It is significant, however, that the Commons declined to admit their jurisdiction "so largely as they had asserted it." The Lords in no way receded from their claims. In 1663 they had sentenced to fine and imprisonment two persons called Fitton and Carr for libels upon Lord Gerard of Brandon.[3] Both had petitioned the Commons, and committees had been appointed to examine the cases. Fitton's case was, on the report of the committee, argued at the bar of the House of Commons. Mr Offley, his counsel, referred to what was undoubtedly one of the main causes of the increased jurisdiction claimed by the Lords when he said that "the jurisdiction of the Star Chamber is now transformed into the House of Lords but somewhat in a nobler way." Nothing further was done in these cases. Possibly the Commons thought that they might be justified on the ground of privilege. The great controversy arose in 1666 in the case of *Skinner v. The East India Company*.[4] Skinner presented a petition to the king against the East India Company. He complained that they had seized his ship, that they had assaulted him in his warehouse at Jamba in Sumatra, and that they had taken away an island which belonged to him. The king referred the matter to the Archbishop of Canterbury, the Lord Chancellor, the Lord Privy Seal, and Lord Ashley to report. After hearing the Company the referees reported in Skinner's favour. The king then sent a message to the

[1] Hargrave's Preface li-liii; L.Q.R. xvii 167-169.
[2] Spence, Equitable Jurisdiction, i 395, 396; L.Q.R. xvii 167, 168.
[3] Hargrave's Preface xcix, c.
[4] Ibid ciii seqq.; 6 S.T. 710.

Lords recommending them to do the petitioner justice; and Skinner himself also petitioned them. The Lords ordered the Company to put in an answer. The Company denied the allegations, and pleaded to the Lords jurisdiction, "because the matters of complaint in the petition are such, for which remedy is ordinarily given in the courts of Westminster Hall, wherein these respondents have right to be tried, and ought not to be brought hither per saltum." The plea was, however, overruled, and they were ordered to pay £5000 damages to Skinner. In the meantime the Company had petitioned the Commons. The Commons voted that the proceedings of the Lords were illegal. Two conferences produced no result. A prorogation till October 1669 was ineffectual to stop the dispute. The king prorogued the Houses in the December of that year till February 1670. When they met he proposed that both sides should erase all records of the matter from their books. The proposal was accepted, and peace restored. The victory remained with the Commons. The Lords have never again attempted to revive their original jurisdiction; and the law was settled in accordance with the views of all the leading lawyers of the day. A slight attempt to revive the jurisdiction was made in 1702.[1] A petition was presented to the Lords against certain judges for not sealing a Bill of Exceptions. But on hearing the judges the petition was withdrawn.[2]

*Jurisdiction arising from some proceeding pending or decided in the lower courts*

In the earlier records of Parliament we find many species of this kind of jurisdiction. But the different species are not clearly distinguished from one another. From the point of view of later history we can classify as follows the various species of this kind of jurisdiction claimed or exercised by the House of Lords:—(*a*) Interference in the course of the proceedings of the lower courts. (*b*) Proceedings by way of error from the Common Law Courts. (*c*) Proceedings by way of appeal from the court of Chancery.

(*a*) Interference in the course of the proceedings of the lower courts.

In the 14th century the court might voluntarily adjourn

[1] Bridgeman v. Holt, Shower 111; Hargrave's Preface clxxxiv-clxxxviii.

[2] Part of the answer of the judges (Shower 117) was as follows: "If the pretended Bill was duly tendered to these respondents, and was such as they were bound to seal, these respondents are answerable only for it by the course of the common law, in an action to be brought on that statute (West. II. c. 31) which ought to be tried by a jury . . . by the course of the common law and not in any other matter."

difficult cases to Parliament in order that the opinion of all the judges upon them might be taken. In later times an adjournment into the Exchequer Chamber served the same purpose.[1]

Sometimes, on the complaint of a litigant, Parliament would order the record to be brought before itself, and either settle the case or give directions to the court below as to how it should be settled.[2] This practice was most frequent when the king's interests were affected. But the same causes which tended to the cessation of the original jurisdiction of Parliament operated here. It was seen that such interference with the process of the lower courts tended to delay justice. Thus in Edward II.s reign Thomas Hobledon prayed that a writ of error depending in the King's Bench might be removed into Parliament. But the answer was "sequatur placitum coram rege quousque revocatum vel affirmatum fuerit."[3] The case of the Stauntons' was a curious case, and perhaps illustrates, as Hale thinks, the fact that the courts below were beginning to set their faces against such interferences.[4] Geoffry de Staunton was sueing John de Staunton and Amy his wife in the Common Bench. A question arising on the pleadings as to the admissibility of a certain averment, he got from the king in his council in Parliament, a writ ordering the Justices to proceed. They did not proceed; and the Chief Justice of the Common Bench asserted that the law of the Parliament was bad. On this Geoffry presented another petition. This time the Chief Justice was ordered either to proceed to judgment before the rising of the Bench or to bring the record into Parliament. It is stated on the roll that this order "assentu est per touz en plein Parlement, et commande per les Prelatz, Countes, Barons et autres du Parlement."[5] The Chief Justice appeared, and Parliament ordered the court to give judgment for Geoffry. But the defendants sued out a writ of error in the King's Bench. There the same delays and adjournments to Parliament were repeated till the plaintiffs in error finally abandoned the case. Certainly the case looks as if the Justices were beginning to dislike the interference of the Parliament. They were only induced to obey by the order of the full Parliament. The

[1] Hale, Jurisdiction of the House of Lords, 114; Reeves, H.E.L. ii 291.
[2] For instances see Reeves, H.E.L. ii 290, 291.
[3] Hale 116; R.P. ii 75 (8 Ed. III. n. 14); Ryley, Placita, 409 (14 Ed. II.).
[4] Hale, Jurisdiction of the House of Lords, 117, 118; Pike, H. of L. 50-53; Y.B. 13, 14 Ed. III. (R.S.) xxxvi-xlii.
[5] R.P. ii 123 (14 Ed. III. n. 31.)

consequence was the statute of 14 Edward III. St. 1 c. 5. The statute recites that delays have been caused by the difficulty of the cases and by the divers opinions of the judges, and enacts that at every Parliament a prelate, two earls, and two barons shall be chosen to hear complaints of such delays. They can cause the record and the judges to come before them, and, by the advice of themselves, the Chancellor, Treasurer, the judges, and other of the King's Council, order the justices to give judgment in accordance with their opinion. If the case cannot otherwise be determined they must bring it before the next Parliament. The statute seems shortly afterwards to have dropped out of use. Coke mentions it in his commentary on Littleton,[1] but he says, in the 4th Institute,[2] that "the frequent use of the Court of Exchequer Chamber hath been the cause that this court hath been rarely put in use." He can only cite one commission in 1345 granted under the statute. The Lords seem silently to have dropped the claim to exercise this species of jurisdiction. They did not revive it in the Stuart period.

(*b*) Proceedings by way of error from the Common Law Courts.

We have seen that a jurisdiction in error was recognised as belonging to the Lords in the 14th and 15th centuries. Like other parts of their jurisdiction it was little used during the Tudor period. Three cases in which writs of error were brought are known in Elizabeth's reign;[3] and the jurisdiction is recognised in the statute which establishes the court of Exchequer Chamber.[4] It was more frequently exercised in the reigns of James I. and Charles I. This branch of the jurisdiction of the Lords has never been seriously disputed.

There were originally two methods by which cases were brought by way of error before the House of Lords. The oldest method was the petition of error to the king and council in Parliament praying that the record might be removed into the full Parliament. The petition endorsed by the king was in the nature of a special commission of the king to Parliament to hear the errors assigned.[5] The later method is the writ of error.[6] The writ was in some respects a writ of course; but up to the time of the Long Parliament there was always a petition to the king for the writ. After the

[1] Co. Litt. 71 b, 72.
[2] At p. 68.
[3] 23 Eliz.; 27 Eliz.; 31 Eliz., Hargrave's Preface vi, vii; Dyer 375.
[4] Above 109.
[5] Hale, Jurisdiction of the House of Lords, 135-143.
[6] Ibid chaps. xxv-xxviii; App. X, B.

Restoration the practice of issuing the writ on the attorney-general's warrant prevailed. In *Paty's case*[1] (1705) all the judges but two resolved that it issued *ex debito justitiæ* except in cases of treason or felony. It operated, like the old petition, as a commission from the king to Parliament to hear the errors. Thus just as the once actual presence of the king in the court of King's Bench came to be a fiction, so the presence and actual share of the crown in judgments of the Lords came to be merely a form.[2] We shall see that the same remark will apply to the criminal jurisdiction of the Lords. The writ was directed to the Chief Justice of the King's Bench. He brought up the roll and a transcript, and the transcript having been examined with the roll, the roll was returned to the King's Bench. The plaintiff then assigned his errors, and got a writ of Scire Facias to the defendant to hear the errors assigned. The defendant appeared and pleaded "in nullo erratum," and the case was heard.[3] Cases once begun were not discontinued by a prorogation. They were so discontinued by a dissolution.[4] When the case had been heard it was sent back to the court from which it had come with a command to issue execution accordingly.

Writs of error could be brought from the Court of King's Bench in England, and from decisions on the common law side of the court of Chancery.[5] After the act of union with Scotland[6] error lay from the Scotch courts. In the Middle Ages error lay from the court of King's Bench in Ireland to the English court of King's Bench.[7] Later it lay either to the King's Bench in England or to the Irish Parliament.[8] From the Irish Parliament error lay to the English Parliament. In 1719 in the case of *Annesley v. Sherlock*[9] the Irish House of Lords denied that this right of appeal existed. The result was an act which declared that the right of final appeal was in the English House of Lords, and denied that the Irish House of Lords had any sort of appellate jurisdic-

[1] Salk. 504; cp. Wilkes' case (1770) 4 Burr. 2550.

[2] But the old theories lived on—thus Holt, C.J., said in Rex v. Knollys (1694) 1 Ld. Raym. 10, 15. "The judicial power is only in the Lords, but legally and virtually it is the judgment of the King as well as of the Lords, and perhaps of the Commons too." [3] Coke, 4th Instit. 21.

[4] Hale, Jurisdiction of the House of Lords, chap. xxix. [5] Ibid 124.

[6] 5 Anne c. 8. The act does not so provide, but as the Scotch was merged in the English Parliament they were held to lie, L.Q.R. xvii 363.

[7] Y.B. 13, 14 Ed. III. (R.S.) lxxii, lxxiii.

[8] Hale, Jurisdiction of the House of Lords, 124.

[9] Lecky, History of Ireland, i 447, 448.

tion.[1] In 1782 this act was repealed; and in 1783 all rights claimed by the British Parliament over the Irish Parliament were renounced.[2] The position of the Irish courts was thereby assimilated to that which the Scotch courts had held after the accession of James I. and before the act of union. The act of union with Ireland (1800) gave the right of final appeal to the House of Lords of the United Kingdom.[3]

(*c*) Proceedings by way of appeal from the court of Chancery.[4]

The court of Chancery was, as we shall see, of a much later origin than the Courts of Common Law. It was not until the reign of James I. that the House of Lords advanced any claim to hear appeals from it. The question whether appeals lay to Parliament had been indeed discussed in Henry VI.'s reign. Some seemed to think that such appeals lay; but Prisot, J., said that though matters which fell under the common law jurisdiction of the Chancery were subject to an appeal to Parliament, it was otherwise in the case of decrees upon equitable matters.[5] There seems to have been a similar difference of opinion in Henry VIII.'s reign; but the discussion upon the question was stopped by order of the king.[6] It was settled at the beginning of the 17th century that the Chancellor might himself re-hear the case, or he might grant a bill of review; but that the only other remedy was to petition the king to appoint commissioners to hear the appeal.[7] In 1616 James I. declared in the Star Chamber that the Chancery was independent of any other court being only under the king.[8] The Commons however in 1621, at the time of the impeachment of Lord Bacon, seem to have thought that an appeal lay to Parliament. But a committee of the Lords in that year reported that there were no precedents for such a proceeding.[9] In 1624, in the case of Mathew, the Lords, in accordance with the report of their committee, requested the king to appoint certain persons commissioners to revise the case,—"which," says Hale, "is an instance of greater weight against the inherent jurisdiction of the Lords

[1] 6 Geo. I. c. 5. [2] 22 Geo. III. c. 53; 23 Geo. III. c. 28.
[3] 39, 40 Geo. III. c. 67.
[4] Hale, Jurisdiction of the House of Lords, chaps. xxxi-xxxiii; Spence, Equitable Jurisdiction, i 393-396; Bl. Comm. iii 454.
[5] Y.B. 37 Henry VI. Hill. pl. 3.
[6] Lord Ellesmere, Observations on the office of a Lord Chancellor, 75; Y.B. 27 Hy. VIII. Mich. pl. 6.
[7] Vawdrey's case (1616) 1 Roll. Rep. 331; S.C. 3 Bulst. 116; 4th Instit. 85; Pennington v. Holmes (1637) Spence i 395 n. f.
[8] Works of James I. 558 (Ed. 1616). [9] Bourchier's case, Hale 195.

than a cart-load of precedents since that time in affirming of their jurisdiction."[1] It is not till 1640 that we actually get a judgment of the Lords reversing a decree of the Chancellor.[2] In 1671 there was an appeal to the Lords which was dropped by the petitioner.[3] In 1675 the case of *Shirley v. Fagg* raised a general discussion of the question.[4] The House of Commons denied the right of the Lords; and they had on their side Lord Nottingham, the Lord Chancellor, and all the lawyers of note. A prorogation did not heal the quarrel. But after a second prorogation of fifteen months the matter was dropped. The Lords have ever since retained this jurisdiction. It was not, however, till 1726 that their appellate jurisdiction over interlocutory orders was established.[5] They retained it in defiance of the opinion of Hale, Nottingham, and Vaughan; and till the end of the century books appeared against it. The victory was probably due to the fact that the Commons feared to trust the king with the appointment of commissioners.

Thus the House of Lords acquired its appellate jurisdiction from the courts of law and equity. Its judgments are binding upon all lower courts and upon itself. Hale indeed thought that a decision of the House of Lords might be reversed by itself or by the full Parliament. But he bases these assertions on precedents of the 14th and 15th centuries.[6] As we have seen, the limits of the jurisdiction of the House of Lords were not then settled. The distinction between judicial and legislative acts was not clearly drawn. In accordance with the opinions of many eminent lawyers, the House of Lords decided in 1898 that it was bound by its own rulings upon questions of law.[7] "There may," said Lord Halsbury, "be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued, and the dealings of mankind rendered doubtful, by reason of different

[1] Mathew's case, ibid 196, 197. The last instance of the appointment of such a commission is in 1639, L.Q.R. xvii 164.

[2] L.Q.R. xvii 167.

[3] Hargrave's Preface cxxxvi.

[4] Ibid cxxxv seqq; 6 S.T. 1122. The question was raised largely through Shaftesbury's efforts to delay a Bill to which he was opposed, Campbell, Lives of the Chancellors, iii 326-332.

[5] C. P. Cooper, Proceedings etc., 161 note.

[6] Jurisdiction of the House of Lords, cap. xxi.

[7] London Streets Tramway Company v. London County Council, L.R. 1898, A.C. 375.

decisions, so that in truth and in fact there would be no real final court of appeal?"

It is quite clear that all the members of the House of Lords are not competent to act as the highest Court of Appeal from the Courts of Common Law and Equity. We have seen that in the Middle Ages cases heard in Parliament were often heard by the Council in which the Chancellor and the judges took their places. From about the middle of the 14th century such cases were heard by the whole House of Lords. Hale says, however,[1] that "since the time that the whole decision of errors has been practised in the House of Lords by their votes, the judges have been always consulted withal, and their opinions held so sacred, that the Lords have ever conformed their judgments thereunto, unless in cases where all the judges were parties to the former judgment, as in the case of ship money." But it was clearly possible that the Lords might decide on less sufficient grounds; and, as we might expect, advantage was taken of this in the reign of Charles II. "It is grown a fashion in the Lords' House," says Hale,[2] "for lords to patronise petitions, a course, that if it were used by the judges of Westminster Hall, would be looked upon, even by the Parliament itself, as undecent, and carrying a probable imputation or temptation at least to partiality." Even the bishops have been known to use their position as lords of Parliament to pronounce a decision in favour of their order, contrary to the opinion of the judges.[3] As a rule the Chancellor or ex-Chancellor or the Lord Chief Justice, if a peer, supplied the House with some knowledge of law. But as late as 1834 the House decided a case without the presence of any professional lawyer.[4] It was in the *O'Connell* case in 1844 that the rule was laid down, which has been since adhered to, that only the law lords should vote upon appeals. It was justly said that "if noble lords unlearned in the law should interfere to decide such questions by their votes instead of leaving them to the decision of the law lords, . . . the authority of this House as a court of justice would be greatly impaired."[5] In the case of *Bradlaugh*

[1] Jurisdiction of the House of Lords 158.

[2] Ibid 201; 6 S.T. at p. 1176; the cases of Reeve v. Long (1695), Salk. 227, and Bertie v. Faulkland, 3 Ch. Ca. 129, cited L.Q.R. xvii 366, 367.

[3] Bishop of London v. Ffytche, cited L.Q.R. xvii 367. The Courts of C.P. and K.B., and 7 out of 8 judges were in favour of the defendant. The House decided for the Bishop by 19 votes to 18. In the 19 votes are included the votes of 13 Bishops.

[4] L.Q.R. xvii 369.

[5] L.Q.R. xvii 369. See Campbell, Chancellors, viii 143-146.

*v. Clarke*, in 1883, a lay peer attempted to vote; but his vote was ignored.

(2) *Criminal Jurisdiction.*

The criminal jurisdiction of the House of Lords falls under two heads—the obsolete jurisdiction and the jurisdiction now existing.

*The obsolete jurisdiction.*

(*a*) Edward III.'s statute of Treasons[1] provided that "because many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason till the cause be showed and declared before the king and his Parliament, whether it ought to be judged treason or other felony." This clause gives to Parliament a right to declare whether certain acts are treason. We are reminded of the clause of the Statute of Westminster II. dealing with trespass on the case.[2] It is not clear whether the clause refers to the judicial or to the legislative powers of Parliament, because at that time the line was not clearly drawn between these distinct powers. Nor was it clear, at the time when the statute was passed, how far the Commons had a right to share in the judicial powers of Parliament. It is therefore perhaps impossible to say definitely whether the clause referred to judicial or to legislative powers.[3] There was an attempt to use the clause at the time of Strafford's impeachment; and then his counsel, Sir R. Lane, argued that it had been repealed by acts of 1399 and 1553.[4] The abandonment of the impeachment shows that the clause was considered to have ceased to be law.

(*b*) The crown could originally accuse great offenders in Parliament. In 1305 the king's attorney accused Nicolas de Segrave before the Parliament of that year.[5] The counts, barons, magnates and others of the council adjudged him

[1] 25 Edward III. St. 5 c. 2. 12.

[2] 13 Edward I. St. 1 c. 24; below 196 n. 3.

[3] Hale considers that it refers to the Legislative power, 1 P.C. 263. So the opinion of all the judges in the Earl of Clarendon's case (1663) 6 S.T. 316. Stephen, H.C.L. ii 252, 253, thinks it refers to the judicial power of the Lords. Probably he is right. The lawyers of the 17th century were obliged to consider precedents in their constitutional rather than their historical aspect because they were the weapons which they used against the prerogative. Cp. Reeves, H.E.L. ii 291. The judges were in the habit of consulting with the Parliament on points of law. The statute probably had this practice in view.

[4] 1 Henry IV. c. 10; 1 Mary, Sess. 1 c. 1 § 3; 3 S.T. 1472.

[5] Parliament Roll 1305 (R.S.) no. 449.

worthy of death. In 1331 Lord Berkeley was accused in Parliament of the murder of Edward II. He put himself upon his country and was acquitted.[1] In 1377 Alice Perrers was similarly accused in Parliament.[2] In the following year she brought a writ of error. The gist of the error assigned is, that there was no regular trial according to the forms of the common law;[3] and this perhaps shows that as the jurisdiction and procedure of the ordinary courts became fixed, such extraordinary proceedings before Parliament were regarded as irregular. The jurisdiction was, however, revived under the Stuarts. In Charles I.'s reign Earl Bristol was accused by the king before the House of Lords.[4] In 1641 Charles had recourse to a similar procedure in the case of the Five members.[5] The procedure was on that occasion declared to be illegal, and has never been revived.

(*c*) One subject could originally "appeal," i.e. accuse another before Parliament of a crime. This method of proceeding was used for political purposes in Richard II.'s reign. In 1387-8 the Lords Appellant accused the Archbishop of York, Robert de Vere Duke of Ireland, the Earl of Suffolk, Tressilian, C.J., and Sir Nicholas Brember, Lord Mayor of London, of treason. In 1397 the king's party in their turn accused the Duke of Gloucester, and the Earls of Arundel and Warwick of treason, in "accroaching the royal power."[6] These cases produced the act of 1399,[7] which provided that all appeals for things done within the realm should be tried and determined according to law; and that from henceforth no appeals be made or in anywise pursued in Parliament. Notwithstanding this act the Earl of Bristol was allowed to bring various charges against Earl Conway and the Duke of Buckingham in 1626.[8] But in 1663, when Earl Bristol accused Lord Clarendon of treason, the Lords resolved, in accordance with the opinion of the judges, that "a charge of high treason cannot by the laws and statutes of this realm be originally exhibited by one peer against another unto the House of Peers."[9]

*The jurisdiction still existing.*

(*a*) Impeachments.[10] The Commons may accuse any person before the Lords. The Lords try the case and, on the demand

[1] Stephen, H.C.L. i 147, 148; 2 R.P. 57.
[2] 3 R.P. 12; Reeves, H.E.L. ii 463.
[3] 3 R.P. 40. [4] 2 S.T. (1626) 1267. [5] 4 S.T. 83.
[6] Stephen, H.C.L. i 152-154; Reeves, H.E.L. ii 463-466.
[7] 1 Henry IV. c. 14. [8] 2 S.T. 1267. [9] 6 S.T. 317.
[10] Stephen, H.C.L. i 156-160; Anson, Parliament, 337-341.

of the Commons, pass sentence. The word impeachment means merely an accusation. Accusations of crime could originally be made either by the king (usually by way of indictment) or by the party injured, by way of appeal. It is probable that the impeachment is a variety of appeal.[1] It has this element in common with it that it is an accusation of crime not made by the king. Hale clearly thought that an appeal and an impeachment were analogous, as he thinks it necessary to say that impeachments are not affected by the act of Henry IV. relating to appeals.[2]

The subject of impeachment has been fully dealt with by constitutional historians. It will be sufficient, perhaps, here to say that the practice of impeachment fell into abeyance (like the other branches of the judicature of the Parliament) between 1459 and 1621. The place of impeachments was taken by acts of Attainder. They were used in the time of the Wars of the Roses much as appeals had been used in Richard II.'s reign. The accused was, however, generally heard in his defence;[3] and at a time when the legislative and the judicial functions of Parliament were not clearly distinguished they might be thought to be judgments of the full parliament.[4] There has been no existence of an impeachment since 1805.

(*b*) Trial by peers. We have seen that it was settled in the course of the 15th century that peers had a right to be tried by their peers if indicted for treason or felony. The method of trial differs according as Parliament is or is not in session. In both cases, indeed, a Lord High Steward[5] is appointed for the occasion. But his position and authority is very different in the two cases.

If Parliament is in session the trial is before the king in

[1] Stephen seems to take this view, but Anson denies it. [2] 2 P.C. 150.

[3] Henry VIII. thought it necessary to get a judicial opinion that the attainder would not be invalid though the persons attainted were not heard. Coke, 4th Instit. 37, 38; Reeves, H.E.L. iii 111, 112.

[4] Thus Coke says (4th Instit. 23) that "both houses together have power of judicature." At p. 21, when talking of the reversal of an attainder, he says "If a nobleman had been erroneously attainted of treason, etc., he might have had his writ of error in Parliament. . . . But if the attainder be established by authority of Parliament, then he must exhibit his petition in Parliament to be restored of grace." No clear distinction is drawn between a legislative and a judicial act. The two things sometimes shade off into one another, as is the case with the modern Parliamentary practice on private bills.

[5] Coke, 4th Instit. 58; Stephen, H.C.L. i 164, 165. The first known instance of a trial before the Lord High Steward is the trial of the Earl of Huntingdon, 1400. The differences between a trial in the Court of the Lord High Steward and a trial before Parliament were settled as early as Henry VII.'s reign, Pike, H. of L. 209-211, 218.

Parliament. Every peer has a right to vote. The question of guilty or not guilty is decided by the majority of votes. The Lords themselves are the judges of law and of fact, and perhaps can act even before the appointment of the Lord High Steward.[1] The Lords resolved in the case of the Earl of Danby's impeachment that, "the High Steward is but Speaker pro tempore, and giveth his vote as well as the other Lords: this changeth not the nature of the court. . . . They have power enough to proceed to trial, though the king should not name a High Steward."[2] This, it is contended, equally applies to the indictment of a peer for treason or felony before his peers. Certainly the Lords have acted as a court without the Lord High Steward; and the opinion of the judges in the case of Earl Ferrers (1760) allowed that the court still subsisted though the Lord High Steward's commission had determined;[3] yet the form of his commission in the case of a peer indicted, differs from the form of his commission in the case of a peer impeached. In the former case his presence is stated to be required;[4] in the latter the Lords ask the crown to make the appointment.[5] The form in the case of an impeachment only dates from the Earl of Danby's impeachment, 1679.[6] It is a step in the gradual elimination of the crown from all active share in the judicature of Parliament — a process which we have seen was operating equally in the case of the writ of error in civil cases. In any case the procedure is historically interesting as the sole survival of the judicium parium.

If Parliament is not in session the Lord High Steward is appointed, and he issues his precept to any twelve or more lords to appear to try the facts. These lords are like an ordinary jury. They must all agree upon their verdict. Their relation to the Lord High Steward is that of a jury to the judge.[7] It was enacted by 7, 8 Will. III. c. 3, that in cases of treason or misprision of treason all peers who have a right to vote shall be summoned at least twenty days before the trial.

[1] Foster, Crown Law, 143.

[2] Ibid 145. In the case of the impeachment of a peer the Lord High Steward presides; in the case of the impeachment of a commoner the Lord Chancellor.

[3] Ibid 139, 140; 19 S.T. 886.

[4] "Ac pro eo quod officium Seneschalli Angliæ (cujus presentia in hac parta requiritur) ut accepimus, jam vacat."

[5] "Ac pro eo quod proceres et magnates in parliamento nostro assemblati nobis humiliter supplicaverunt ut Seneschallum Angliæ pro hac vice constituere dignaremur."

[6] Foster, Crown Law, 144-146.

[7] Coke, 3rd Instit. 28-31.

In both cases the indictment is found by the grand jury, and removed into parliament by writ of certiorari.[1]

(3) *Jurisdiction in cases of Privilege.*

The question what is the relation which the jurisdiction conferred by the privilege of Parliament bears to the jurisdiction of the ordinary courts is not perhaps finally settled. "The precedents of Parliament are contradictory, the opinions and decisions of judges have differed, and the most learned and experienced men of the present day are not agreed."[2] This is a question which affects Lords and Commons alike, and it is not intended to deal with it here.

The Lords have by their privileges jurisdiction in three classes of cases. (*a*) They can fine, and imprison for a definite term for contempt.[3] What the House will adjudge to be a contempt is within its own discretion. In the 17th and 18th centuries the Lords pushed this jurisdiction to its most extreme limits.[4] They punished "libels and slander, not only against the House of Lords collectively, but against every lord individually; and not only when the libel and slander related to the actual exercise of their legislative, judicial, or consultative functions, but when it was foreign to such exercise."[5] The distinction drawn by Hargrave in this passage is now the distinction observed.[6] (*b*) The House of Lords can decide on the effect or the validity of the creation of a new peerage by the crown. Thus in 1711 it decided that the acquisition of an English peerage did not entitle a Scotch peer to a seat. In 1782 it reversed that decision. In 1856 it decided that a life peer could not sit in the House.[7] (*c*) If there is a disputed claim to an old peerage the Lords can decide as between the claimants if, and only if, the matter

[1] The last instance of the trial of a peer by Parliament is that of Earl Russell for bigamy, L.R. 1901, A.C. 446; the last instance of a trial in the court of the Lord High Steward is that of Lord Delamere for treason in 1686, 11 S.T. 510.

[2] May, Parliamentary Practice (Ed. 1893) 128.

[3] If the prisoner is not committed for a definite term he will probably be released by a prorogation, 6 S.T. 1296. But cf. Stockdale v. Hansard (1839) 9 A. and E. 127. The Commons cannot commit for a definite term, and have not fined since 1666.

[4] See Floyd's case (1621), Hargrave's Preface xvi-xix; Blunt's case (1621) and Morley's case (1623), Hargrave, Jurisconsult exercitations, i 284; Cases of Fitton and Carr (1667), Hargrave's Preface xcix, c.

[5] Hargrave, Jurisconsult exercitations, i 289.

[6] For a similar rule as to contempts of other courts see M'Leod v. St Aubyn, L.R. 1899 A.C. at p. 561. Lord Morris said that this power "is not to be used for the vindication of the judge as a person" . . . "Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice." As late as 1799 (R. v. Flower 8 T.R. 314) a person was committed for publishing a libel on a member of the House.

[7] Anson, Parliament, 219.

is referred to them by the crown. Lord Holt, in the case of *Rex v. Knollys*,[1] declined to pay any attention to an adjudication of the Lords upon a question of this kind, because the matter had not been referred to them by the crown. The decision was questioned by the Lords at the time. In the debate on the Wensleydale Peerage Case in 1856 Lord Campbell admitted its justice.[2]

[1] 1 Raym. 10 (1694). Holt declined to give to a committee of the Lords the reasons for his decision. There was talk of a committal, "which vanished in smoke," Campbell, Lives of the Chief Justices, ii 148-152.

[2] Hansard cxl 329. In 1669, in the FitzWalter case, the crown referred the matter to the Privy Council, Pike, History of the House of Lords, 130. Ld. Campbell says that in earlier times such cases were referred to the Constable and Marshal.

## CHAPTER V

## CHANCERY

IN this chapter we shall deal with

I. The history of the Chancery and the development of the Court of Chancery.

II. The jurisdiction of the Chancellor and the Court of Chancery.

I. The history of the Chancery and the development of the Court of Chancery.

The history of the Chancery will be dealt with under the following heads:—

1. The Mediæval period.
2. The Tudor and early Stuart period.
3. The organization of the Court of Chancery.
4. The defects in the organization of the Court of Chancery and its reorganization in the 19th century.

1. The Mediæval period.

We have seen that under the Norman and Angevin kings the Chancery was the secretarial bureau, and the Chancellor the secretary of state for all departments.[1] To him was therefore entrusted the Great Seal by which acts of state and royal commands were authenticated. It is the Chancellor's position as keeper of the Great Seal which puts him at the head of the English legal system, and makes him the legal centre of the constitution.

We have seen that the English legal system is a system of royal justice. All original writs are royal commands, and must be sealed by the Chancellor. The Chancery, says Lambard, is "the forge or shop of all originalls."[2] In the same way all important government acts — treaties with foreign states, the assembly of Parliament, royal grants — must pass the seal, and must therefore pass under his review. Applicants for justice in the Courts of Common Law, petitioners

[1] Above 25.

[2] Archeion 58 (Ed. 1635). Writs which began a legal proceeding were called "original." Those which were issued in the course of a legal proceeding were called "judicial."

to the King, to the Council, or to Parliament, will sooner or later come to the Chancery either for an original writ, or to obtain the execution of the answer endorsed upon their petition. The Chancellor and the Chancery are thus in direct connection with all parts of the constitution.[1] This accounts for the extraordinary range and variety of the Chancellor's duties. Of their range and variety Bentham's critical summary will give us the best idea.[2] He is "(1) a single judge controlling in civil matters the several jurisdictions of the twelve great judges. (2) A necessary member of the Cabinet, the chief and most constant adviser of the king in all matters of law. (3) The perpetual president of the highest of the two houses of legislature. (4) The absolute proprietor of a prodigious mass of ecclesiastical patronage. (5) The competitor of the Minister for almost the whole patronage of the law. (6) The Keeper of the Great Seal; a transcendent, multifarious, and indefinable office. (7) The possessor of a multitude of heterogeneous scraps of power, too various to be enumerated." It is no wonder that lawyers and statesmen regard the Great Seal—the clavis regni—with an almost superstitious reverence. It is treason to counterfeit it;[3] and they come to think that if it is used—it may be contrary to the will, or during the madness of the sovereign—the act is as authentic as if the sovereign had really sanctioned it.[4]

It is the relation of the Chancellor and the Chancery to

[1] The intimate relation of the Chancery with all departments of government is well described in a treatise on the Masters written when Ellesmere was Chancellor. "Both the Parliament is summoned by writs out of the Chancery; the acts made and enrolled are kept in the Chancery; all commandments of that court are expedited either by writs out of the Chancery, or by the Chancellor's serjeants at arms; the Lord Chancellor is ever speaker of that House without further choice or appointment . . . and the clerk of the Parliament has his fee out of the hanaper as an office of the Chancery. The reason of their attendance there I take to be, not only for the receiving of petitions; but as the judges are there, that, by observing the minds and the reasons of the Lords that make the laws, they may the more agreeably to their reason expound and interpret the said laws; so the masters of Chancery are there also, that they may likewise frame the writs that are to be made upon those laws in like correspondence; and as the judges furthermore may inform the lords how former laws of this realm presently stand touching any matter there debated; so may they also be informed by the masters of the Chancery (of whom the greatest number have always been chosen men skilful in the canon and civil law) in laws that they shall make touching foreign matters, how the same shall accord with equity, jus gentium, and the laws of other nations," Hargrave, Law Tracts, 308, 309.

[2] Cited Parkes, Chy. 437. Cp C. P. Cooper, Chy. 381, 382 n.

[3] 25 Edward III. St. 5 c. 2 § 5.

[4] As to the making of a new Great Seal during the Great Rebellion see Campbell, Chancellors, iii 3-11. As to the use of the Great Seal during the madnesses of George III. ibid v 337, 341, 590; vii 96.

conjunction with the judges or the serjeants.[1] In Edward III.'s reign the Chancellor ceased to follow the king in his progresses about the country.[2] In a statute of 1340 the Chancery is mentioned as a court with the other courts.[3] In 1349 the king's writ to the sheriff of London directed that petitions relating to the common law should be brought before the Chancellor, that petitions relating to the grant of the king's grace should be brought before the Chancellor or the keeper of the Privy Seal, and that only the petitions of which those officials could not dispose should be brought before the king in person.[4] This order is probably only of a temporary nature.[5] But it is clear from it that the Chancellor is becoming associated with petitions which ask something of the king's grace, and that he has a position of decisive importance in the Council. Matters were habitually referred to him where it was difficult to obtain a remedy, or where there was no remedy at common law.[6] In Edward III.'s reign, in fact, the Chancery begins to be regarded not merely as a department of state but as a court. In 1345 the clerks of the Chancery petitioned that the Chancellor or Keeper of the Great Seal might have exclusive jurisdiction over all trespasses committed by them.[7] This claim to possess the privileges of the officials of the other courts shows that the Chancery was beginning to be considered as a regularly constituted court. In 1394 the Chancellor was empowered to take security for costs and to give damages.[8] This power was again recognised and enlarged in 1436.[9]

[1] Campbell, Chancellors, i 207. For cases of Edward II.'s reign collected, see ibid 209-112.

[2] Campbell i 218; cp 28 Ed. I. St. 3 c. 5; Pulling, Order of the Coif, 89, 91. In Ed. II.'s reign there are entries of payments made for horses to carry the Chancery Rolls, Palgrave, Council, note F.

[3] 14 Ed. III. St. 1 c. 5. In 27 Ed. III. St. 1 c. i, the Council is distinguished from the Chancery.

[4] Volumus quod . . . negotia ad communem legem penes . . . Cancellarium nostrum per ipsum expedienda, et alia negotia de gracia nostra concernenda penes eundem Cancellarium, seu dilectum clericum nostrum Custodem sigilli nostri privati prosequantur." See Select Cases in Chy. (S.S.) xvii, xviii.

[5] Kerly, Equity, 31, 32.

[6] Kerly 32, 33 cites a case in which the judges referred a matter to the Chancellor from Y.B. 46 Ed. III. Mich. 23; 47 Ed. III. Mich. 14. Close Rolls (Rec. Comm.) xxviii; Reeves, H.E.L. ii 467-469.

[7] R.P. ii 154 nos. 41, 42, cited Campbell i 274 n. But Y.B. 8 Hy. IV. Mich. 13 b Gascoigne denied that the Chancery was a "court judicial."

[8] 17 Rich. II. c. 6. Coke (4 Instit. 83) says that this power only arose after the truth or untruth of the allegations had been established, i.e. on or after hearing. It gave no power to award costs at all stages of the suit.

[9] 15 Hy. VI. c. 4; Coke, 4th Instit. 83, 84. Lord Hardwicke, in Corporation of Burford v. Lenthall (1743) 2 Atk. 551, said that the court had an inherent power to deal with costs "arbitrio boni viri." See also Andrews v. Barnes (1888) L.R. 39 C.D. 133.

The Chancellor was thus regarded as possessing a jurisdiction. The Chancery was beginning to be regarded as a court. But we must not think that the Chancellor had as yet got the sole jurisdiction in a distinct court of Chancery. The Chancery is still a department of state. It is still as the leading legal member of the Council that the Chancellor exercises jurisdiction.

With the history of the Council we shall deal in the following chapter. We shall see that Parliament in the 14th and 15th centuries made many complaints against the jurisdiction of the Council. With the jurisdiction of the Council the jurisdiction of the Chancellor is usually associated.[1] In the same way the Chancellor is sometimes associated with the Council in the petitions which recognise, or attempt to regulate its jurisdiction.[2] In other cases jurisdiction seems to be given to him personally.[3] It is clear from some of the cases brought before him that his peculiar jurisdiction is becoming more distinct. The early bills in Chancery show that the Chancellor was beginning to exercise a jurisdiction outside the common law.[4] But this jurisdiction was still exercised in conjunction with the judges, serjeants, and others of the King's Council. Mr Baildon cites two cases of 1377 and 1407 in which the Chancellor by himself dismissed a bill; and in 1474 we have a decree made by the Chancellor alone.[5] In other cases, however, he acts with the Council. "The regretable scarcity of recorded judgments leaves the evidence on this point in a very unsatisfactory state." It is probable that it is not till the end of the 15th century that the Chancellor gets a jurisdiction clearly distinct from that of the Council.

It is, however, becoming possible during the Lancastrian period to classify the different classes of cases with which the Chancellor and the Council deal. This classification is the basis of the district courts of the following period:—

[1] 13 Rich. II. n. 33 (R.P. iii 267); 17 Rich. II. n. 52 (R.P. iii 323); 9 Hy. V. n. 25 (R.P. iv 156). They are all directed against the practice of summoning persons before the Chancellor or the Council. They do not distinguish between a summons before the Chancellor and a summons before the Council. Select Cases in Chy. (S.S.) xvii.

[2] The statute of præmunire (27 Ed. III. St. 1 c. 1) provides that offenders shall appear in the Council or the Chancery. Cp 4 Hy. IV. c. 23.

[3] R.P. iii 297 nos. 1, 2. Two petitions sent to the Chancellor to deal with; ibid 474 no. 95, petition that the judges may not be taken out of their courts to discuss matters traversed in Chancery. Cp. 15 Rich. II. c. 12.

[4] For a summary of these bills see Select Cases in Chy. (S.S.) xxx-xlii; Cooper, Public Records i 359-384.

[5] Select Cases in Chy. (S.S.) xv, xx.

(1) There is a jurisdiction over cases which fell altogether outside the common law. Such cases are those which concern alien merchants, maritime or ecclesiastical law.

It was considered that the common law did not extend to such cases. Thus the question whether the king should have certain goods arrested in an alien ship, supposed to belong to the enemy, was debated in the Chancery.[1] Certain cases involving ecclesiastical law were there debated in Edward III.'s reign.[2] In Edward IV.'s reign occurs the case of the carrier who broke bulk.[3] The Chancellor thought that the matter was properly determinable before the Council because the plaintiff was an alien merchant, and the case therefore depended on the law of nature and not upon municipal law. We shall see that in later days cases of this kind fell within the jurisdiction either of the Courts of Common Law, or of special courts such as the Admiralty, or the Ecclesiastical Courts. But from those special courts it was to the king in Chancery that appeals lay, until an act of the 19th century gave the appellate jurisdiction in such cases to a committee of the Council.[4]

(2) There is a jurisdiction of a quasi-ministerial nature exercised chiefly in matters where the king's interests were involved.

In later days this jurisdiction will become the common law, as distinct from the equitable jurisdiction of the Chancellor. We shall see that in the mediæval period those two jurisdictions are by no means distinct.[5] During the whole of this period the relations between the Chancery and the Common Law Courts are close. The judges as members of the Council took part in the Chancellor's decisions.[6] They were sometimes made Chancellors.[7]

In Henry IV.'s reign the Commons complained that the

[1] Hargrave, Law Tracts, 311; 31 Hy. VI. c. 4; 14 Ed. IV. c. 4; Select Cases in Admiralty (S.S.) i liv, lv. As to a similar jurisdiction delegated to the Court of Requests, ibid lxv; King v. Carew (1682) 1 Vern. 54, 55.

[2] Hargrave, Law Tracts, 312.

[3] Y.B. 13 Ed. IV. Pasch. pl. 5, cp. Ellesmere, Observations concerning the office of Chancellor, 110, 111. Select Cases in Chy. (S.S.) 3, 4, 9, 96.

[4] Below 292, 293. [5] Below 235, 236.

[6] Select Cases in Chy. (S.S.) xv, xvi, xix, xx. As late as the reign of Elizabeth the Chancellor gives a decree jointly with the judges, Spence i 383 n. g; Close Rolls (Rec. Comm.) xxviii.

[7] Parning 1341. Of him Coke said (4th Instit. 79), "This man knowing that he that knew not the common law could never well judge in equity (which is a just correction of law in some cases) did usually sit in the court of Common Pleas (which court is the lock and key of the common law) and heard matters in law there debated, and many times would argue himself." Thorpe 1371. Knyvet 1372.

judges were taken out of their courts to assist in discussing cases in Chancery.[1] It was not till the Tudor period that this close connexion between the Chancery and the common law judges ceased. There is therefore no clear distinction between the common law and equitable jurisdiction of the Chancellor in this period. It was becoming clear when Staunforde wrote his treatise on the prerogative in 1590.[2] It was settled when Coke wrote his Fourth Institute.[3] But we may see survivals of the old connexion in the rule that the Chancellor, not being able to summon a jury, must send issues of fact for trial to the court of King's Bench,[4] and in the power of the Chancellor (which lasted till 1852)[5] to require the judges either to assist him in the hearing of a case, or to give him their opinions on points of law.[6] A story which Lord Eldon used to tell is a good illustration of the practice. He once sent a case to the court of King's Bench to enquire what estate the trustees took under a certain settlement. That court certified that they took an estate in fee. He sent the same case to the court of Common Pleas. That court certified that they took no estate at all. He then demonstrated that they were both wrong as the trustees took a chattel interest.[7]

(3) There is a jurisdiction in cases where the common law gave a remedy, but where, owing to the disturbed state of country, or to the power of the defendant, the ordinary courts could not act.

(4) There is a jurisdiction to deal with cases which could not be dealt with by the ordinary courts because the law itself was at fault.

All through the Middle Ages the turbulence of the country and the power of the defendant is quite as often the ground for the interference of the Chancellor as the strictness of the law.[8] It was not till the Tudor period that the "overmighty subject" was effectually curbed by the enlargement of the powers of the Council. This change contributed largely

[1] Below 199 n. 3. [2] L.Q.R. i 454. [3] 79, 80.

[4] Ibid. Coke explains the rule by saying that, "for that purpose both courts are accounted but one." [5] 15, 16 Vict. c. 86 § 61.

[6] Spence i 383, 384. In Gore v. Gore (1722) 10 Mod. 501 Parker, L.C., said that he considered himself bound by the opinions of the judges when he had referred a case to them, *secus* where the judges had assisted at the hearing and he had heard the argument; for then the decree was his own and he must be satisfied. Cp. North, Life of Ld. Keeper Guildford, i 271.

[7] Campbell, Chancellors, vii 651.

[8] Fortescue's Government of England illustrates the disturbed state of the country and suggests the remedies afterwards adopted by the Tudors. The Paston letters give a striking picture of the prevailing disorder.

towards the formation of a distinct court of equity. The nature and scope of the equitable jurisdiction becomes more definite when the Chancellor is relieved of cases which called for equity, not because the law was at fault, but because its enforcement was impossible. But it was only gradually that the equitable jurisdiction loses all traces of its early connexion with the incompetence of the criminal law. A case which called for equity upon the latter ground was heard by the Chancellor as late as the reign of Elizabeth.[1] As late as 1684 the court of Chancery entertained applications for changing the venue in actions at law in cases where, owing to the power of one of the parties, a fair trial could not be had.[2] But the court gradually confined itself to giving compensation in such cases, leaving the culprits to be punished by the court of Star Chamber or by the Common Law Courts.[3] In more modern times the court has declined to exercise any jurisdiction for the repression of crime, unless the exercise of such jurisdiction is incidental and necessary to the due exercise of the equitable jurisdiction of the court.[4] But to the end the old connexion survived in the forms of the court. Until the 19th century bills in Chancery usually charged the defendant with combination and confederacy;[5] and in the last resort a commission of rebellion might issue to enforce appearance.[6]

At the end of Edward IV.'s reign, however, we can see that a purely equitable jurisdiction exercised by the Chancellor and his court is becoming gradually distinct. In the Close Roll of 7 Edward IV.,[7] when the seals were given to Kirkham, M.R., it is recorded that "the King willed and commanded . . . that all manner of matters to be examined and discussed in the court of Chancery, should be directed and determined according to *equity and conscience, and to the old course and laudable custom of the same court*, so that if in any such matters any difficulty or question of law happen to rise, that he therein take the advice and counsel

[1] Spence i 687. The defendant under colour of a distress for rent due by the plaintiff violently took from him, among other things, the hand loom by which he earned his living. Puckering, L.K., ordered restoration of the loom and the payment of 5 marks damages for the outrage.

[2] 1 Vern. 439; Spence, i 699

[3] Spence i 351, 689, 691.

[4] Gee v. Pritchard (1818) 2 Swanst. 413.

[5] Warren, Law Studies i 479.

[6] Spence i 371; North (Life of Lord Keeper Guilford i 258) says that if the defendant did not appear upon subpœna and proclamations, "then he was a rebel, and commissioners, that is a petit army, was raised to fetch him in as standing out in rebellion."

[7] Close Rolls (Rec. Comm.) xxxi.

of some of the king's justices, that right and justice may be duly ministered to every man."

Thus at the end of the Middle Ages the Chancery has become a court. Its connexion with the Council is so close that in most cases the Council rather than the Chancellor gives the judgment of the court. Its jurisdiction can be classified upon different principles; but as yet there is no very distinct treatment of the cases which fall within these different principles. Certain lines of cleavage are indicated. Distinct separation upon these lines takes place in the following period.

(2) The Tudor and early Stuart period.

The creation of a strong executive government was the achievement of the Tudor dynasty. This was accomplished by a reorganization of the Council, a new classification of its powers, and the creation of a number of new courts.[1] The Chancery becomes separate from the Council. The Chancellor obtains certain well-defined jurisdictions, and becomes the judge of the court of Chancery.[2]

During this period the more regular enrolment of the decrees of the court shows that its jurisdiction was becoming more settled,[3] and the number of cases heard there shows that its popularity was growing. "Sir Thomas More was Chancellor about three years and seven months, and there remain nearly 500 of the suits commenced during this period. Of the suits brought in the reign of James I. there exist about 32,220, making an average of about 1464 suits in each year of the reign. . . . The suits instituted during the nine years (1673-1682) that Lord Nottingham held the great seal have been estimated at not less than 15,000, which calculation yields a yearly average of about 1650."[4] This increase in the number of cases heard took place in spite of the fact that the political often interfered with the judicial duties of the

[1] Below 271 seqq. Some instances of new courts are the Court of Augmentations, 27 Hy. VIII. c. 27, Coke, 4th Instit. 121; the Court of Surveyors, 33 Hy. VIII. c. 39, Coke, ibid 122; the Court of Wards and Liveries, 32 Hy. VIII. c. 46, Coke, ibid 188; the Court of the Commissioners of Sewers, 23 Hy. VIII. c. 5, Coke, ibid 275.

[2] Palgrave, Council, 97. He does not think that the Chancellor regularly decided cases as an independent judge much before Henry VIII.'s reign.

[3] The decree rolls do not begin till 26 Hy. VIII.; the decree and order books till 36 Hy. VIII. (Select Cases in Chy. (S.S.) xxix). In the Legal Judicature in Chancery at p. 151 a note of Sir J. Cæsar on a Decree Roll of 31 Hy. VIII. is cited. The note states that till 36 Hy. VIII. the decrees were not enrolled, but the history of the case was shortly noted on the back of the bill in Latin, according to the form of proceedings in the civil and canon law.

[4] C. P. Cooper, Public Records i 356 n.; Chy. 104, 105 n.

Chancellor, and in spite of the fact that Chancellors, whose knowledge of law and equity was of the slightest, were often appointed for political reasons.

Cardinal Wolsey (1515-1529) greatly increased the power and jurisdiction of the court. His position as first minister and favourite of the king made the court so popular that by royal commission he established four new courts of equity to cope with the arrears of business.[1] This was afterwards made one of the articles of his impeachment.[2] It is during the time that he held the seals, that we meet with the first instance of a special commission directed to certain judges, masters of the court and others, authorising them to hear and determine all cases committed to them by the Chancellor.[3] We can see from the description of Wolsey as Chancellor given to us by Cavendish that the court of Chancery is now distinct from the Council,[4] and that it is recognised as a court of conscience and equity.[5]

After the fall of Wolsey it was found that the cause list was much in arrear. There were many complaints that writs of subpœna were issued without any enquiry whether the plaintiff had probable cause for taking proceedings. Sir Thomas More (1529-1532), his successor, cleared off the arrears;[6] and made the salutary order that, "no subpœna should issue till a bill had been filed, signed by the attorney; and, he himself having perused it, had granted a fiat for the commencement of the suit."[7] He did the work of the court himself. Roper tells us that, "he used to examine all matters that came before him like an arbitrator; and he patiently worked them out himself to a final decree, which he drew and signed."[8] He

[1] Campbell, Chancellors, i 506.

[2] Article 21 (Coke, 4th Instit. 92), "he hath brought the more part of the suitors of this your realm before himself."

[3] Campbell, Chancellors, i 655.

[4] "He would repair unto the Chancery, sitting there till eleven of the clock, hearing suitors and determining divers matters. And from thence he would divers times go into the Star Chamber as occasion did serve," Life of Wolsey 40.

[5] Ibid 167. "The king ought of his royal dignity and prerogative to mitigate the rigour of the law . . . therefore . . . he hath constitute a chancellor, an office to execute justice with clemency, where conscience is opposed by the rigour of the law. And therefore the court of Chancery hath been heretofore commonly called the Court of Conscience; because it hath jurisdiction to command the high ministers of the common law to spare execution and judgment, where conscience hath most effect."

[6] Campbell, Chancellors, i 551. This gave rise to the following verse:—

"When More sometime had Chancellor been
No *more* suits did remain:
The same shall never *mores* be seen,
Till More be there again."

[7] Ibid 547.

[8] Life of More.

was admitted on all hands to be strictly impartial—to the disappointment occasionally of some of his relations.[1]

His successors Audley, Wriothesly, and Rich were not persons of any note. The judicial duties of the Chancellor were often delegated to commissioners.[2] Bishop Gardiner was much occupied with political and religious controversies; but he was learned in the common law, and there are no complaints of him as a judge. It was not till Elizabeth appointed Nicholas Bacon Lord Keeper (1558-1579) that the court of Chancery had a professional lawyer at its head. "The business of the court of Chancery had now so much increased, that to dispose of it satisfactorily required a judge regularly trained to the profession of the law, and willing to devote to it all his energy and industry. The Statute of Wills, the Statute of Uses, the new modes of conveyancing introduced for avoiding transmutation of possession, the questions which arose respecting the property of the dissolved monasteries, and the great increase of commerce and wealth in the nation, brought such a number of important suits into the court of Chancery, that the holder of the Great Seal could no longer satisfy the public by occasionally stealing a few hours from his political occupations to dispose of bills and petitions, and not only was his daily attendance demanded in Westminster Hall during term time, but it was necessary that he should sit, for a portion of each vacation, either at his own house, or in some convenient place appointed by him for clearing off his arrears."[3] It was while he held office that it was declared first by royal warrant, and afterwards by statute that the office of Lord Keeper gave the same powers and jurisdiction as the office of Lord Chancellor.[4]

That the Chancery was now a settled court demanding as its judge a trained lawyer, is illustrated by the sensation caused by the appointment of Sir Christopher Hatton (1589) to the office of Chancellor. He was one of the queen's most favoured courtiers, and especially noted for his skill in dancing. The Bar resolved that they would not plead before him. However the Attorney and Solicitor General could not join the strike for fear of losing their places; and the Bar returned to practice. He had the sense to be always attended in court by four masters in Chancery,

[1] More's life of his grandson Th. More (Ed. 1726) 165; see also 207-210.
[2] Campbell, Chancellors, ii 14. [3] Campbell, ibid ii 87.
[4] 5 Eliza. c. 18. The act is declaratory in form. But in earlier times there was sometimes a Chancellor and a Lord Keeper at the same time, the Keeper acting as the Chancellor's subordinate, Campbell, Chancellors, ii 94.

and, with their assistance, managed to get through the business of the court.[1]

Such an experiment could not be tried again. His successor Lord Keeper Puckering was a "blackletter lawyer." But he was too deeply skilled in the technicalities of the common law to be a good judge of a court of Equity.[2] He was succeeded by Sir Thomas Egerton (1596-1617), who is better known as Lord Ellesmere. He is one of the founders of our system of Equity. He was thoroughly conversant with the rules and forms of the court from his extensive practice as a barrister. He was learned in the common law, and, in addition, knew something of other legal systems. His demeanour as a judge was an example.[3] With the part which he played in the development of the jurisdiction of the court we shall deal later. It was while he was Chancellor that the question of the relation of the Courts of Common Law to the court of Chancery was decided. It was largely owing to him that the Chancery successfully asserted its claim to be a court not only of co-ordinate, but in some respects of superior jurisdiction.[4] We shall see that he did much to put upon a regular footing the jurisdiction of the court of Star Chamber.[5] He wrote a treatise upon proceedings in Chancery, and an account of the office of Lord Chancellor. He gives a true, though perhaps a somewhat highly coloured, sketch of the office. In it we may see traces of the time when the Chancery was more than a court of Equity.[6] But in his description of the court we can see that it is its equitable jurisdiction which has become its distinctive feature. "It is," he says, "the king's High Court of Conscience made especially to redress private causes, such as by extremity of law cannot have agreeable end to equity by reason of circumstances hindering; wherein it is to be noted that conscience is so regarded in this court that the laws are not neglected, but they must both meet and join in a

[1] Campbell, Chancellors, ii 148-151.

[2] Ibid 167, 173.

[3] Ibid 260. All the virtues of his predecessors are attributed to him by Lord Campbell.

[4] Below 248-250.

[5] Below 277.

[6] Office of Lord Chancellor 21. "As the chancellor is at this day . . . the mouth, the ear, the eye, and the heart of the prince, so is the court whereof he hath the most particular administration, the oracle of equity, the storehouse of the favour of justice, of the liberality royal, and of the right pretorial which openeth the way to right, giveth power and commission to the judges, hath jurisdiction to correct the rigour of the law by the judgment and discretion of equity and grace. It is the refuge of the poor and afflicted; it is the altar and sanctuary for such as against the might of rich men, and the countenance of great men, cannot maintain the goodness of their cause."

third, that is a moderation of extremity."[1] From his time the court of Chancery is established in substantially its modern form. The speech of Bacon when he took his seat in the court of Chancery, and the orders which he issued as to the practice of the court illustrate this.[2]

His successor Bishop Williams was not a professional lawyer. The fact that a long vacation devoted to law, and the assistance of the officers of the court, the Master of the Rolls, and the judges enabled him to perform his judicial duties without public scandal, is a testimony both to the unsettled state of the principles of equity, and to the growing organization of the court. His successor Coventry was a professional lawyer. With the assistance of Sir Julius Cæsar, the Master of the Rolls, he won some applause as an equity judge, and as a reformer of the abuses of the court. His successors Finch and Littleton were also professional lawyers. Shaftesbury[3] (1672-1673) was the last Chancellor who was not a lawyer. He was appointed for political reasons of a most corrupt kind. His appearance was "more like a young nobleman at the University than a Lord High Chancellor."[4] He slighted the Bar and trampled upon the forms of the court. But the Bar took an effectual means of exposing his incompetence. They let him make what orders he pleased, and then, after notice, moved him to discharge them, giving such reasons against them that it was clear that they could not stand. "And this speculum of his own ignorance and presumption coming to be laid before him every motion day, did so intricate and embarrass his understanding, that, in a short time, like any haggard hawk that is not let sleep, he was entirely reclaimed."[5]

The period of the Great Rebellion is interesting chiefly for the illustration which it affords of the abuses of the court in the 17th century, and the remedies proposed for those abuses. With this period we shall deal later. The Restoration brought back the court of Chancery in its original state. In that state it continued till the reforms of the 19th century.

Before we describe the constitution of the court as it was settled in the 17th century, we must first notice the *Court of Requests*, a minor court of equity which flourished during the Tudor and early Stuart period.

The court of Chancery was as we have seen a busy and a

[1] Office of Lord Chancellor 29.
[2] Bacon, Works, vii 755. Campbell, Chancellors, ii 366, 367.
[3] Campbell, ibid iii 307-314. [4] North, Examen, 60.
[5] North, Examen, 58.

popular court. One court was not enough to meet the demand for a court with an equitable jurisdiction.

The Court of Requests was a court of equity for poor suitors, or for the king's servants specially privileged to sue there.[1] There appears to be no foundation for the view that the court dates from an earlier period than Henry VIII.'s reign.[2] The first record of a case decided there is in the eighth year of that reign. It is clear from a list of the judges of the court that it was originally a standing committee of the Council. The members of the court were the same persons as the members of the court of Star Chamber.[3] But it tended to become a regular court separate from the Council. Wolsey placed it permanently at Whitehall.[4] Towards the end of Henry VIII.'s reign the regular judges of the court were civil or canon lawyers who were styled Masters of Requests.[5]

The social and agrarian changes which were beginning to be felt in Henry VIII.'s reign greatly increased its jurisdiction.[6] In Elizabeth's reign there were two masters ordinary, and two masters extraordinary. The first followed the queen in her numerous progresses. The second remained at Whitehall.[7] Four masters ordinary were appointed in James I.'s reign. But royal progresses still continued; and the masters were sometimes called upon to sit in the court of Star Chamber.[8] It is made a matter of complaint that the proceedings of the court were hindered, "for that there is not one person certeyne that doe alwayes sit judge there, but they sitt by turnes and by starts."

The court was popular. It exercised a jurisdiction in equity, and over certain matters which fell within the cognisance of the Star Chamber.[9] Though the expenses of pro-

[1] The name is apparently derived from a similar court in France in which those specially privileged by the king could sue, Coke, 4th Instit. 97.

[2] Select Cases in the Court of Requests (S.S.) ix, x. Spence i 351 dates the court from an order of 13 Rich. II. for the regulation of the Council, according to which the bills of poorer suitors were to be examined and despatched by the Keeper of the Privy Seal and such of the Council as were present. There is here no separate court. There is simply a connexion between the poorer suitors and the Privy Seal which gave rise, under the Tudors, to the separate court. Coke (4th Instit. 98) says that the court is mentioned in none of the reports on treatises of Henry VIII.'s reign. Lord Ellesmere (Observations concerning the office of Lord Chancellor 8) dates the jurisdiction of the Masters of Requests from Henry VIII.'s reign. Cp. Reeves, H.E.L. iii 401.

[3] Select Cases, etc., cviii, cix.

[4] Ibid xiii, xiv, lxxxi, lxxxii.

[5] Ibid xvi.

[6] Ibid liv-lxviii. Inhabitants of Burnam v. Fynes 62; Kent and others v. Seyntjohn 64; Foreacre and others v. Frauncys 101; Inhabitants of Whitby v. York 198.

[7] Ibid xix.

[8] Ibid xx, xcvii.

[9] Select Cases, etc., xxi, xxii.

ceeding there tended to grow, it always continued to be the court for poor men.[1]

Towards the end of Elizabeth's reign the court was attacked by the Courts of Common Law.[2] We shall see that the Courts of Common Law showed at this period a jealousy of all jurisdiction other than their own. They had, as we have seen, won a complete victory over the older local courts.[3] They now attacked courts which had greater powers of resistance because they had sprung, like themselves, from the crown. Their theory was that a court could not be a legal court unless its jurisdiction was based either upon an act of Parliament or upon prescription. Upon this theory the court of Chancery and the Council were by prescription legal courts. But more recent committees of the Council, and the court of Requests, could show neither a statutory nor a prescriptive title. They denied, therefore, that the court of Requests was a legal court.[4] Sir Julius Cæsar urged in its defence that it was substantially the same court as the King's Council. It is true that it had sprung from the King's Council. But it is clear that in James I.'s reign it was a court quite separate from the King's Council, because no place was assigned to the judges of the court among the Privy Councillors.[5] He urged also that the legality of its jurisdiction had been recognised by the judges. This is to some extent true.[6] The answer of the common lawyers is given by Coke. "As gold or silver may as current money pass even with the proper artificer, though it hath too much alloy, until he hath tried it with the touchstone: even so this nominative court may pass with the learned as justifiable in respect of the outside by vulgar allowance, until he advisedly looketh into the roots of it, and try it by rule of law; as (to say the truth) I myself did."[7] But it is clear that the "touchstone" was not so much the rule of law as the changed outlook and the growing independence of the Common Law Courts.

In 1590 we find the earliest record of a writ of Prohibition issued against the court by the court of Common Pleas.[8] In

[1] Smith, De Republica Anglorum (Ed. 1675), Bk. iii c. 7.

[2] Select Cases, etc., xxii-xlvi. Sir Julius Cæsar, one of the Masters of Requests, wrote an elaborate vindication of the court in 1596. Mr Leadam gives an account of this in the introduction to the Select Cases xxii-xxxv.

[3] Above, chap. ii. [4] Below 285 seqq.; Select Cases, etc., xl.

[5] See the petition of the Masters of Requests to be allowed such a place, Select Cases, etc., xcix, c.

[6] Ibid xxxii-xxxv. But there were only four instances, the earliest of which was a century after the establishment of the court. [7] 4th Instit. 98.

[8] Select Cases, etc., xxxvi, xxxvii, followed by other cases in C.P. and Q.B.

1598 occurs the case of *Stepney v. Flood*, which Coke treats as finally deciding the illegality of the court.[1] But in spite of these decisions, and of others to the same effect in James I. and Charles I.'s reigns,[2] the court continued to thrive. It met a want which was felt. Its cause list was full. In 1627, when Lord Manchester was Lord Privy Seal, Fuller says that the court was in such repute that "what was formerly called the Almes Basket of the Court of Chancery, had . . . as much *meat* in, and *guests* about it (I mean suits and clients) as the Chancery itself."[3] Even Coke is obliged to admit that it might be well if its jurisdiction were established by Parliament.[4]

Blackstone considers that the Court of Requests was "virtually abolished" by the Act of 1640 which abolished jurisdiction of the Council in England.[5] This is substantially the true account of the matter. Mr Leadam points out truly that the decisions of the preceding reigns directed against the court had been based on the principle that the Court of Requests was a separate court, and not the Council;[6] and that no attempt was made to put the Act in force against the court. It continued to sit, indeed, till 1642.[7] But after the Restoration, though Masters of Request were appointed, they performed no judicial duties. They merely examined personal petitions for royal favours.[8] Mr Leadam says, "Charles II. was too well advised to imperil a yet unsettled throne by an exercise of prerogative which would have excited lively apprehension throughout the country. If, it would have been asked, the King, despite the decisions of the judges of Elizabeth, and in the face of the Act of 1640, could re-establish the Court of Requests, then, why not the Star

[1] 4th Instit. 97; 1 Cro. 646 (sub nomine Stepney v. Lloyd), Anderson, C.J., and Glanvil, J., said, "This court hath not any power by commission, by statute or by common law." They contrasted it with courts like the court of Wards which had such power by statute. In Paine's case (1608), Yelv. 111, it was ruled that perjury was not there punishable, as the court had no jurisdiction.

[2] Earl of Derby's case (1614) 12 Co. Rep. 114; Penson v. Cartwright (1615) 2 Cro. 345; Calmadie's case (1640) 3 Cro. 595.

[3] Campbell, Lives of the Chief Justices, i 360, citing Fuller ii 169.

[4] 4th Instit. 98. "And although the law be such as we have set down; yet in respect of the continuance that it hath had by permission, and of the number of decisions therein had, it were worthy of the wisdom of a Parliament, both for the establishment of things for the time past, and for some certain provision with reasonable limitations . . . for the time to come."

[5] Bl. Comm. iii 50. So Hale, Jurisdiction of the House of Lords, 57. "This court he (the keeper of the privy seal) held for a while, but being under a discontinuance, it hath now for many years been asleep." [6] Select Cases xlix.

[7] Between 28th of April and 17th of May 1642, 556 orders were made, ibid l.

[8] Ibid c, ci.

Chamber?"[1] This is probably the gist of the matter; and this justifies Blackstone's statement that the court was "*virtually*" abolished by the Act of 1640.

The court of Chancery was therefore left the sole court of equity. We must now consider the way in which it was organized.

3. The organization of the Court of Chancery.

Writers of the 17th century state that the Lord Chancellor is the sole judge of the court.[2] But the Lord Chancellor, being much occupied with political duties, often needed assistance. From the reign of Henry VIII. onwards he was generally assisted by the Master of the Rolls. The Master of the Rolls was the chief of the Masters in Chancery. We shall first describe their position, and then trace the history of their chief.

Fleta,[3] in his chapter on the Chancery, says that there were associated with the Chancellor "clerici honesti et circumspecti Domino Regi jurati, qui in legibus et consuetudinibus Anglicanis notitiam habeant pleniorem; quorum officium sit supplicationes et querelas conquerentium audire et examinare et eis super qualitatibus injuriarum ostensarum debitum remedium exhibere per brevia regis." Elsewhere he calls these clerks "collaterales," "socii," and "præceptores" of the Chancellor.[4] In fact during the Middle Ages we find them called by very various titles, all implying that they are assistants to the Chancellor.[5] Their number seems from an early date to have been fixed at twelve;[6] and it continued to be twelve. But in the time of Hatton and Egerton we meet with Masters Extraordinary who did certain ministerial acts in the country.[7] They were paid in early times partly by fees, but chiefly in kind. They lived together in the king's house or in a special dwelling set apart for them; and they had certain allowances of clothes, food and drink. They were all in orders before Henry VIII.'s reign. The Chancellor seems to have acquired the patronage of all livings under 20 marks in order that he might be able to reward the Masters, and other officials of the Chancery.[8] In the treatise on the

[1] Select Cases, etc., lii.

[2] Coke, 4th Instit. 84; Ellesmere, Observations, etc., 31; Spence i 357 and note. [3] II. 13. 1. [4] II. 13. 12.

[5] Treatise on the Masters (written while Egerton was Lord Keeper, 1596-1603), Hargrave's Law Tracts 294. They are styled "Magistri cancellarii, concilium regis in cancellaria, socii, collaterales, clerici de prima forma, clerici primi gradus, clerici de majore gradu, clerici magni, clerici ad robas."—The reason for the last name is that they wore robes or gowns of the king's gift.

[6] Ibid 297. [7] Ibid. Spence i 365.

[8] Treatise on the Masters 315-317.

Masters there is a complaint that other officials of t Chancery had usurped their duties, and had diminished t value of their offices by intercepting their fees.[1] But, th they gained considerable profit from the increased busine of the Chancery, is clear from the fact that in 1621 it co be asserted that eight of their number had given £150 piece for their offices.[2]

They were in early times occasionally appointed by th crown. In the reign of Edward IV. the Chancellor acquired the right, which he exercised till 1833, of appointing eleven of them.[3] The appointment of their chief, the Master of th Rolls, remained with the crown. The Chancellor admitted them to office by placing a cap upon their head in court.[4]

The duties of the Masters were in earlier times very various. Their large range made it necessary that they should be acquainted not only with the common law, but also with the canon and civil law.[5] They may be summarized as follows:—(1) Fleta describes them as superintending the issue of all original writs.[6] By the end of Elizabeth's reign their duties in this respect seem to have been confined to the issue of writs of grace such as subpoena, supplicavit, certiorari, or ne exeat regno; and even these often issued as of course.[7] (2) They acted occasionally as the king's secretaries.[8] (3) They attended the House of Lords without writ. They were often nominated triers of petitions.[9] Originally they took rank above the Attorney and Solicitor General, the King's Counsel, and the serjeants, till one Dr Barkley in 1576 ventured to address the House without leave. Since that time they took rank below the serjeants.[10] (4) They assisted the Council and the Chancery in the various branches of their jurisdiction.[11]

Their duties became specialized with the growing jurisdiction of the court of Chancery. At an early period we find them examining witnesses in causes depending in the Chancery.[12] But this duty had, by the end of Elizabeth's reign, devolved on special examiners and Masters Extra-

[1] Treatise on the Masters 315-317.
[2] Spence i 361 n. a, citing a speech of Sir E. Coke in the House of Commons.
[3] Treatise on the Masters 293; 3, 4 Will. IV. c. 94 § 16.
[4] Ibid 294. They are there compared to Doctors in a University.
[5] Ibid 301, 309, 310. In Mary's reign there was a complaint that they neglected the common law for the civil law, and that in consequence writs were carelessly issued, History of the Chancery 36 seqq.
[6] II. 13. 1.
[7] Treatise on the Masters 301, 302, cp. Bacon's Orders no. 85.
[8] Ibid 303.
[9] Ibid 308, 309.
[10] Ibid 298, 299.
[11] Ibid 309-313.
[12] Ibid 303.

dinary.[1] Their chief duty was to assist the Chancellor the hearing of cases, and also on seal days, i.e. on days hen he heard motions on interlocutory matters.[2] No doubt ey often helped the unprofessional Chancellor to conceal is weaknesses. They were sometimes compared to the edanei judices of the later Roman law, because the hancellor could delegate to them the duty of hearing nd reporting upon certain parts of a case.[3] The system f delegation seems to have been carried to an excess. Bacon's orders[4] defined the matters which could be so delegated. No reference was to be granted upon a demurrer, or upon a question touching the jurisdiction of the court; no reference to hear and determine, or as to the general state of the case, except in special cases. They were to examine accounts, because such questions were not as a rule fit for the court; but the cause must first have come to a hearing that the masters might receive some directions as to the scope of their enquiries. These orders show that the preceding practice had been lax. Bacon did much to fix their position as assistants to the court, whose duty it was to report upon matters referred to them. Their position becomes more definite with the development of the jurisdiction of their chief, the Master of the Rolls.

The Dialogus de Scaccario mentions a clerk of the Chancery whose duty it was to oversee the scribe who composed the Chancellor's roll.[5] Possibly this official is the Clerk or Curator of the Rolls, and the Master of the Rolls of later law.[6] In 1388 he was assigned a place above the judges.[7] In 1378 Parliament confirmed a grant by Edward III. of the Rolls House, a building which, since Henry III.'s reign, had been a home for converted Jews.[8] The Chancellor admitted the Master of the Rolls to office by putting him into the possession of this house.[9]

[1] Spence i 365.

[2] Treatise on the Masters 307; Ellesmere, Observations, etc., 36, 37. The term "interlocutory" seems to have originated with Lord Ellesmere. Norburie, Abuses of Chancery (Hargrave, Law Tracts, at p. 443), talks of "those orders which the last Lord Chancellor not unaptly termed *interlocutory*, being before hearing."

[3] E.g. taking of accounts, the hearing of applications relating to procedure, the examination of interrogatories, or the sufficiency of answers, and till Bacon's time demurrers. Spence i 361. [4] Orders 45-53. [5] Stubbs, Sel. Ch. 178.

[6] The title of the Master of the Rolls in the Middle Ages is Clerk or Curator of the Rolls, Spence i 100, 357; History of the Chancery 21, 22. He is not called Master of the Rolls in any statute till 11 Henry VII. c. 18. Till Henry VIII.'s reign he was a cleric, Spence i 357 n. d.

[7] Discourse, etc., 18, 19. In James I.'s reign his place was between the two chief justices. [8] History of the Chancery 20, 21. [9] Spence i 357.

We have seen that with the development of the jurisdiction of the Chancery the judicial duties of the Masters began to increase. From the first a large share of these judicial duties fell to the Master of the Rolls, who was sometimes assisted by the judges.[1] In the reign of Henry VIII. he is sometimes called Vice-Chancellor.[2] But up to this reign his jurisdiction differed from that of the other Masters in degree rather than in kind. The practice, which dates from the time of Wolsey, of delegating to him a certain jurisdiction by special commission, gives him in time a jurisdiction which is quite different from that of the other Masters.[3] These commissions were at first addressed not only to the Master of the Rolls, but also to the judges and the other Masters. They empowered the persons named to hear the kind of cases specified in the commission. Later they were addressed to the Master of the Rolls only, and empowered him to hear cases generally.[4] The practice had become so usual that Coke states generally that in the absence of the Lord Chancellor he hears causes and makes orders.[5] From 1623 he appears to have had some share in regulating the practice of the court, as, after that date, many of the general orders were issued by the Chancellor and the Master of the Rolls.[6] He comes to be in fact the general deputy of the Lord Chancellor.

It was not certain, however, whether the Master of the Rolls exercised these powers by virtue of his position as Master, or by virtue of the special commission addressed to him. In the 18th century the jealousy of the other Masters raised the question of his authority to act as general deputy of the Chancellor.[7]

[1] Spence 358 and notes; Discourse, etc., 90-109. There are the following references to the judicial capacity of the M.R. in the Year Books of the 15th century:—1 Hy. VII. Pasch. pl. 1; 1 Hy. VII. Trin. pl. 5; 4 Ed. IV. Mich. pl. 5; 11 Ed. IV. Trin. pl. 14; 12 Ed. IV. Mich. pl. 11; cp. 11 Henry VII. c. 25.

[2] Discourse, etc., 20. From Hy. VI.'s reign we find bills addressed to him. But this was usual only when the office of M.R. was associated with that of Lord Keeper. [3] Campbell, Chancellors, i 506. [4] Spence i 365, 366.

[5] 4th Instit. 97. But as late as the beginning of the 17th century the office was treated as a sinecure. Egerton held the office of M.R. for seven years while he was Lord Keeper. When he became Chancellor it was conferred by James I. on a Scotch favourite who knew nothing of the duties of the office. This experiment does not appear to have been repeated, Campbell, Chancellors, ii 223, 224.

[6] Spence i 359 n. a.

[7] A Mr Burroughs wrote "a history of the Chancery relating to the judicial power of that court and the rights of the Masters," maintaining that the M.R. had only judicial authority *qua* master. This was answered in the "Discourse of the Judicial Authority of the Master of the Rolls," attributed to Ld. Hardwicke and Sir J. Jekyll. Burroughs replied with his "Legal Judicature in Chancery," cp. C. P. Cooper, Chancery, 349, 350 n.

The controversy illustrates the gradual way in which the jurisdiction of the Chancery had developed. It was clear that originally the Master of the Rolls had been simply one of the Masters. Like them he acted for the Chancellor. His grant of office contained no explicit reference to judicial duties.[1] It was not clear whether he could act alone by royal commission,[2] or whether proceedings before him were valid in the absence of two of the other Masters.[3] But it was clear that another judge was needed for the Chancery. It was possible, owing to the uncertainty of the older practice, and the certainty of the more recent practice, to contend that there had always been a subordinate judge in the Chancery. The controversy concerned but a small point of legal history. But the arguments used on either side remind us of the larger political controversies of the 17th century. Both were argued as questions of legal history. In both each side tried to elicit, from the uncertain precedents and forms of an earlier age, the answer to a question of which the makers of those precedents and forms had never dreamed.

The question was settled by 3 George II. c. 30. It was enacted that all orders made by the Master of the Rolls (except such orders as the Lord Chancellor alone could make) should be valid, subject to an appeal to the Lord Chancellor. But the Master of the Rolls still sat merely as deputy of the Lord Chancellor. C. P. Cooper,[4] writing in 1828, said, "the sittings of the Master of the Rolls still continue to be regulated upon the old notion of his having no authority to hear causes, except in the Chancellor's absence and as his deputy, and this, extraordinary as it may appear, is the only reason that can be assigned for the Master of the Rolls not sitting on Wednesday and Friday evenings during term, and at other times when the Chancellor was anciently in the habit of holding his sittings."

In addition to the Masters the Chancery possessed an extensive staff of clerks. The most important of these are known as the Six Clerks.[5] Their duty was to write and

[1] Legal Judicature in Chancery 97-100.

[2] Discourse, etc., 137-144; Legal Judicature 177.

[3] Legal Judicature 182-185; 268; Discourse, etc., 162, 163. In Smith v. Turner (1684) 1 Vern. 273, 274, it is stated that the M.R. has no jurisdiction in the absence of two of the other masters. Cp. Meneit v. Eastwicke, ibid 264-266. It is stated in the report that the record does not bear out the reports of these cases.

[4] Chancery 350, 351.

[5] Fleta II. 13. 15 says, "Habet etiam sex clericos suos prænotarios in officio illo, qui cum clericis memoratis familiares regis esse consueverunt, et præcipue ad victum et vestitum, quia ad brevia scribenda secundum diversitates querelarum

examine the writs before they were sealed. If a wrong writ were issued they were liable.[1] They were under the superintendence of the Master of the Rolls, and assisted him in keeping the Rolls.[2] They acted also, in earlier times, as the solicitors of the parties. With the increase in the jurisdiction of the court their duties became at once less burdensome and more profitable. The duty of drawing up the writs fell on the cursitors.[3] The appointment of a registrar of the court, as early as Henry V.'s reign, relieved them of the duty of recording the orders and decrees of the court. At a later date the creation of an office for filing affidavits relieved them of the custody of these documents.[4] The growing business of the court made it impossible for them to act as solicitors to the parties. They are declared, it is true, in Lord Clarendon's orders, to be the proper and only officers of the court to inform themselves, and to report to the court on the state of their clients' causes. But the clients often employed their under clerks,[5] and finally their own solicitors.[6] The Six Clerks, however, still continued to keep the records, and to make for their supposed clients copies of the proceedings for which they took large fees. From the time of Charles I. they divided the cases among them by an alphabetical arrangement.[7]

Although they had ceased to superintend the business of the suitors, their remuneration increased with the increase in the amount and value of the business of the court. The suitors were obliged to take copies of the proceedings, which they did not need, because the Six Clerks had nominally the conduct of the suits. They still further lightened their duties, without diminishing their salary, by an agreement which they came to in 1785.[8] It was arranged that their business should be conducted in one room, and that they should take it in turns to be present; that the one present should do all the business arising in any suit, whether or not it was appropriated

sunt intitulati (sic); et qui omnes pro victu et vestitu de proficuo sigilli, in cujuscumque usus provenerint, debent honeste inveniri." They were in orders till 14, 15 Hy. VIII. c. 8, Reeves, H.E.L. iii 250.

[1] Spence i 366. [2] History of the Chancery 32.

[3] Fleta II. 36; Bacon's works vii 699, 700.

[4] Spence i 366; Bacon loc. cit.

[5] Ex parte the Six Clerks (1798) 3 Ves. 589, 601.

[6] It is clear from Hudson's treatise on the Star Chamber that the class of solicitors was new at the beginning of James I.'s reign. He says at pp. 94, 95, "In our age there are stepped up a new sort of people called solicitors, unknown to the records of the law, who, like the grasshoppers of Egypt, devour the whole land." Cp. Twort v. Dayrell (1806) 13 Ves. 195.

[7] Ex parte the Six Clerks 3 Ves. 590. [8] 3 Ves. 594.

to himself, and should credit the clerk, to whom the suit was appropriated, with the fees. Thus each clerk drew his salary for two months' work in the year. Seeing that their under clerks attended court, and that the parties' own solicitors conducted the causes, their sole work consisted in keeping certain records, in signing certain documents connected with the cause, and in taking large fees for badly-executed and needless copies of such documents.[1]

The Six Clerks were assisted by a body of persons known in later law as the sixty clerks.[2] They were at first merely the employés of the Six Clerks. In 1596 they were regularly established as officers of the court. They took an oath on entering office and were called the sworn clerks. Egerton fixed their numbers at eight to each Six Clerks. This number was afterwards raised to ten.[3] After many disputes, owing to attempted changes in the Commonwealth period, their status was fixed in 1668. Their number was fixed at sixty. They were to be chosen from those who had served seven years as clerks to the Six Clerks. They were paid by a fixed percentage of the fees paid by suitors to the Six Clerks.

There were many other officials of the court, not material to be here mentioned.[4] The Masters and the clerks, acting under the Lord Chancellor and the Master of the Rolls, were the most important part of the staff of the court.

4. The defects in the organization of the Court of Chancery and its reorganization in the 19th century.

The Chancery was, as we have seen, a department of state before it became a court. Though it had become a court with an increasing jurisdiction it continued to be organized upon similar principles. The defects of its organization as a court naturally became more apparent with the growth of its jurisdiction. We begin to hear complaints as to these defects in the 16th century. They are complaints of the same nature as were heard at the beginning of the 19th century.

The subject falls historically into the following periods:—

(i) The period before the Great Rebellion.

(ii) The period of the Commonwealth.

[1] See the evidence given before the Chancery Commission of 1816, cited Parkes, Chancery, 576; below 229.

[2] Fleta II. 13. 15 mentions, "clerici juvenes et pedites, quibus de gratia Cancellarii concessum est pro expeditione populi brevia facere cursoria; dum tamen sub advocatione clericorum superiorum fuerint, qui eorum facta in eorum receperint pericula."

[3] Ex parte the Six Clerks 3 Ves. 589, 599.

[4] Fleta II 36; Ellesmere, Observations, etc., 36-39; App. XXVI.

(iii) The period after the Great Rebellion.
(iv) The reorganization of the court in the 19th century.

(i) The period before the Great Rebellion.

The Parliamentary debates and the pamphlets of the late 16th and early 17th century supply abundant evidence of the discontent which was felt with the court.

(*a*) The judicial staff was inadequate.

It was said in a debate in Parliament of 1623 that 35,000 subpœnas were issued in one year. It is probable that over 20,000 were issued.[1] It was clear that the work was too much for the Chancellor and the Master of the Rolls.[2] The result was a heavy arrear of causes. The abuses arising from the dilatory administration of justice were aggravated by the suspicions entertained, not without reason, that the justice when administered was not always pure.[3]

(*b*) Abuses of many kinds had sprung up in the offices of the officials of the court.

As early as 1382 it had been said of the Masters that they were "over fatt both in bodie and purse and over well furred in their benefices, and put the king to verry great cost more than needed."[4] The dilatory nature of the proceedings in their offices, the high fees which they exacted, the manner in which they made use of their position to exact their fees and even additional gratuities, are clearly proved by contemporary evidence. Suits, it was said, had lasted for 20 years.[5] In consequence money was paid for expedition. A regular trade was carried on in the placing of causes upon the lists which was termed "heraldry."[6] It was in vain that statutes fixed the fees to be taken by the Masters. It was in vain that the Chancellor ordered them to hear causes with speed and regularity.[7] Suitors naturally gave presents to those who

[1] Commons Journals i 573, 574. Sir F. Fane, patentee of the subpœna office, put the number at 16,000. Some intermediate figure is probably correct.

[2] Coke said this in a debate in 1621, Commons Journals i 594.

[3] Abuses of the High Court of Chancery (written soon after the fall of Bacon while Bishop Williams was Chancellor), Harg., Law Tracts, 433.

[4] Treatise of the Masters, Harg., Law Tracts, 314. The writer (314-317) complains that their profits had been curtailed by the appointment of additional officers. It is clear that with the increasing jurisdiction of the court they had found additional sources of revenue.

[5] Commons Journals i 574. One of the speakers (Mr Alford) said that his suit had lasted 30 years.

[6] Life of Ld. North i 266; Parkes, Chancery, 325-328.

[7] 1 Jac. I. c. 10; 13 Car. II. Spence (Equity i 401, 402) says that the latter statute was printed as a private Act and so escaped attention. "The late Mr Agar, K.C., brought it to light in Lord Eldon's time, but it was totally disregarded."

were in possession of uncontrolled power. Far less could they object to unnecessary copies and lengthy documents, the fees for which were merely a decent cloak for direct bribery.[1] It was in fact the abuses of the Masters' offices which first called Bentham's attention to the state of English Law at the beginning of the 19th century. A client was obliged to pay for three attendances in a Master's office when only one was given.[2]

The clerks resorted to similar but more simple methods of increasing their remuneration. A writer of 1627[3] tells us that, "the under clerks with their large margins, with their great distance between their lines, with protraction of words, and with their many dashes and slashes put in place of words, lay their greediness open to the whole world; and I have heard many say, that they are as men void of all conscience, not caring how they get money so they have it; and that with as good a conscience they may take a purse by the highway, but not with so little danger; . . . I did see an answer to a bill of forty of their sheets, which, copied out, was brought to six sheets." Similar abuses had crept into the offices of the other officials of the court. The office which issued subpœnas had become a mere monopoly as early as the reign of James I.

We are not surprised to learn that persons made use of the court merely to delay justice. "Of ten bills," says Norburie, "hardly three have any colour or shadow of just complaint."[4] The causes of these defects are not far to seek.

The practice of the court was unsettled, and many of the Chancellors were not competent to settle it. No trouble was taken to distinguish suits which were merely frivolous from those which were real. Everything was referred to the Masters.[5] Counsel made needless interlocutory motions which entailed new references, commissions to take evidence, or orders to interrogate the parties. "It hath ever been

[1] Harg., Law Tracts, 429, 447. It appears from Lord Coventry's orders (1635) that the Masters unduly lengthened the proceedings by making special certificates and needless recitals. See the orders, Spence, Equity, i 403, 405.

[2] Mill, Dissertations and Discussions, i 336.

[3] The Present State of England, Carey (Harleian Miscellany iii 552, 557, Ed. 1809). For the same abuses in Hardwicke's time, see Campbell, Chancellors, v 63, 64.

[4] Harg., Law Tracts, 434.

[5] "For what a miserable thing it is, that the plaintiff should bring the defendant from the furthest part in England to answer an idle bill; which done, he will perhaps quarrel at some part of the answer, get it referred to some Master of the Chancery, and consequently overruled for insufficient; and so having vexed and put him to great expenses, leave him in the end to wipe his sleeve for any recompense he shall get, be the cause ever so ridiculous," ibid 434, 435.

noted that none will be so ready to move as he that hath the worst cause; for he hath nothing else to trust to. If he cannot get his adversary on the hip by some trick or other in order or reference, and so bring him to some hard composition, actum est with him."[1] Even if a decree were made the Chancellor would reopen the whole matter on bare surmise; and that might mean new orders, references, and examinations.[2] "A cause in Chancery, though never so plaine, after a reference or two, and a generation or pedigree of orders, the controversie will become so intricate, that, the merits of the cause being lost, all the labour lies in the managing of reports and orders."[3] When a decree was made it was often couched in terms so vague that the Registrars could draw what orders they pleased; and this obviously led to rehearings and further orders.[4] During this period the rules of equity were so vague that enormous scope was left to those who desired to persuade a weak or a corrupt Chancellor.[5]

The Chancellor exercised no detailed supervision over his officials. It is true that Chancellors like Bacon or Coventry issued orders to regulate practice. They were of little avail. Bacon's orders of 1618 had specially prohibited general references to the Masters.[6] Coke in 1621 said that the Chancellor practically made the Masters his deputies by the general character of his references to them.[7] Coventry issued a series of orders relating to the Masters. Spence, writing in 1846, said that some of the evils against which these orders were directed, were felt in his day.[8] In many cases the Bar was more able than the Bench.[9] Partly from want of capacity, partly from want of time, the Chancellor was unable to prevent abuses

[1] Harg., Law Tracts, 443.

[2] "I dealt with a client not long since that had an injunction for the possession of lands. His adversary moved by a great councillor to dissolve the same. It was granted, unless we should show good cause to the contrary by a day, albeit the motion was grounded, only on a mere suggestion, not verifiable by any affidavit, certificate, or other evidence in the world. . . . We attended six days at least to show cause, which cost us £10 at the least. We were heard at last and showed cause, *which was easy to do*, and kept our possession," ibid 440, 441.

[3] Vindication of the Professors and Profession of the Law, by William Cooke (1642), cited Parkes 126. Roger North (Life of Lord North) i 262 refers to the "superfetation of orders."

[4] Life of Lord North i 263, 264.

[5] Harg., Law Tracts, 430.

[6] Order 47 (Works vii 766).

[7] Commons Journals i 594.

[8] i 403.

[9] Proposals for regulating or taking away of Chancery, cited Parkes 153-156. The evil was felt in the 18th century. It was said that in the time of Lord Ch. King (1725-1727) the cases were equitably arranged by the then leaders of the Chancery bar, Sir P. Yorke and Mr Talbot, Campbell, Chancellors, iv 643, 644.

which were concealed from him by the plausibility of counsel or the interest of the official.

Owing to the methods by which the officials of the court were paid it was to his interest to shut his eyes. This was in fact the chief cause of the origin and permanence of the system. Like many other officials in the Middle Ages they were paid by fees upon the business done. This may originally have been a proper method of payment. It became a most extravagant method of payment when the business of the court began to increase.[1] The fees were excessive, and the officials who received them were the most determined opponents to effective reform. They formed a close body who resented any increase in their numbers because it would diminish their fees. To the end there continued to be twelve masters and six clerks of the court.[2] These officials did their work by deputies whom they generally underpaid.[3] Their deputies naturally tried to recoup themselves by questionable practices. Sometimes they concealed business from their superiors and kept the fees. Sometimes they paid the fees over and relied upon expedition money.[4] Thus, while the actual work was badly done by underpaid deputies, the suitor paid enormous fees to sinecure officials. These officials naturally regarded their offices merely as property. They were sold by the Chancellor or given to his relations.[5] An attack upon one of these officials always appeared to those interested in the patronage, not as the act of dismissing a useless servant, but as the act of depriving a man of his freehold. It was on this ground that the Six Clerks escaped abolition in the time of the Commonwealth.[6] It followed that all those who, from their experience of the court, were most competent to reform

[1] In St John's College, Oxford, within living memory the porter was paid by fees (called imposits) for various services rendered to members of the college. It was found that, owing to the increase in the size of the college, his emoluments amounted to something like £400 a year. This illustrates on a small scale what went on in the court of Chancery.

[2] Observations concerning the Chancery, cited Parkes 149-153. "The several Masters of the Rolls for the time being . . . having the nomination of the Six Clerks, Examiners, and Registrars found it more profitable to continue them at that small number, and sell their offices for great sums of money to men altogether ignorant of the practice of the court, than to admit deserving men gratis, and, as business increased, to have increased able and honest working attornies, as the judges of the other courts of justice did."

[3] Exact relation of the Proceedings of the late Parliament (1653), cited Parkes 129.

[4] Life of Lord North i 263.

[5] In 1621 it was said that the Masters had paid £150 each for their places, Commons Journals i 594. There is evidence that in the 17th century the place of a Six Clerk was worth £6000, Ex parte The Six Clerks (1798) 3 Ves. 589, 599.

[6] Ex parte the Six Clerks (1798) 3 Ves. 599, 600.

it, were the most interested in maintaining it in its existing condition. Commissions of enquiry revealed abuses. They could do little to remedy them.[1] From the Lord Chancellor who sold the higher offices, to the under clerk who did the work of the higher official, all had an interest in maintaining the system. The court, it was said with some truth, was a "mere monopolie to cozen the subjects of their monies."

(ii) The period of the Commonwealth.

We shall see that in the earlier part of the 17th century the court of Chancery had, with the assistance of the crown, defeated the attempt of the Common Law Courts to set bounds to its jurisdiction. Though the dispute was settled the old enmity survived. The Parliamentary opposition under the earlier Stuarts was largely composed of the common lawyers. They were naturally eager to expose the abuses of a successful rival. In 1620 and 1623 the Grand Committee of Justice had considered at length the abuses of the court. A bill to regulate proceedings in Chancery had been introduced in 1621, but it was dropped.[2] It was only natural, that when the Parliament got the upper hand, the court of Chancery should appear to be the greatest of these legal anomalies which it was resolved to remedy.

The period of the Commonwealth was a period when all existing institutions were put upon their trial. The legal system of the country had gradually grown up. It had been gradually adapted to the exigencies of an advancing civilization by a series of small changes and legal fictions. Cumbersome forms, an expensive procedure, abuses in which many had a vested interest were the result. No reasonable man who looked at the existing condition of things could defend it. It was only a special training which could enable anyone to understand it. Those who had endured the labour necessary to understand it were the only persons competent to reform it. They were the last persons likely to undertake such a reform. They could explain the apparent anomalies; and it is a common fallacy to confuse explanation and justification. Any measure of reform would render useless knowledge which it was painful to acquire and profitable to apply.

The Commonwealth statesmen saw clearly the objects which they desired to attain. Most of these objects were eminently reasonable. Many of them have been carried out

[1] A commission in 1598 enquired into the fees taken by officials of the court.

[2] It dealt specially with the fees of the Masters. See Parkes 92; Harl. Miscellany iii 552; Spence, Equity, i 400, 401.

in the 19th century.[1] But they wanted the technical skill necessary to carry them out. Although they had the assistance of Sir Mathew Hale and Lane, C.B., the majority had no technical acquaintance with law. The training required for an adequate working knowledge of the law is great; and the reformation or restatement of the law requires a knowledge still more thorough. Without this necessary knowledge the Commonwealth statesmen undertook the task. It was of a piece with the rest of their programme. They had abolished the old order, and they now proposed

"To cast the kingdoms old
Into another mould."

Their zeal carried them some distance, and produced some valuable suggestions for reform. But their opponents numbered almost all those whose technical knowledge was necessary for carrying out their ideas. Ludlow[2] tells us that, "upon the debate of registering deeds in each county, for want of which within a certain time fixed after the sale, such sales should be void, and being so registered, that land should not be subject to any incumbrance; this word 'incumbrance' was so managed by the lawyers, that it took up three months' time before it could be ascertained by the committee." It was clear that no permanent result could be attained by such a committee.

The abuses of the court of Chancery were perhaps more obvious than those of any other department of law. In a two days' debate in 1653 the abuses of the court were fully exposed.[3] We are told that, "in the course of the debate the court of Chancery was called by some members the greatest grievance in the nation. Others said, that for dilatoriness, chargeableness, and a faculty for bleeding the people in the purse vein, even to their utter perishing and undoing, that court might compare with if not surpass any court in the world. That it was confidently affirmed by

[1] Among the reforms proposed were:—An act to abolish fines and recoveries; an act to register births, marriages, and burials; an act for the more speedy recovery of small debts; an act against the sale of offices; an act to make debts assignable; an act for the registration of conveyances, wills, and administrations; an act for reorganizing the common law courts and simplifying their procedure; an act for establishing a county judicature; an act for regulating the criminal law, and for abolishing anomalies like the peine forte et dure, benefit of clergy, the refusal of counsel to prisoners. See Somers, Tracts, vi 177-245.

[2] Memoirs i 430, cited Somers, Tracts, vi 177.

[3] Two papers upon the court were circulated among members, called "Observations on the Court of Chancery," and "Proposals for regulating or taking away of Chancery"; they are printed by Parkes 149-156.

knowing gentlemen of worth, that there were depending in that court 23,000 cases, some of which had been there depending five, some ten, some twenty, some thirty years and more; that there had been spent therein many thousand pounds to the ruin, nay utter undoing of many families. . . . That what was ordered one day was contradicted the next, so, as in some causes, there had been 500 orders and more . . . so that some members did not stick to term the Chancery a mystery of wickedness, and a standing cheat, and that in short so many horrible things were affirmed of it; that those who were or had a mind to be advocates for it, had little to say on the behalf of it, and so, . . . it was voted down."[1]

The existing organization of the court was abolished, and a bill was introduced to reconstitute it. The bill effected considerable improvements. The time within which pleas and demurrers were to be heard was fixed. Six Masters sitting in public were to hear all references. Penalties were inflicted if any cause was heard out of its turn. A table of fees, much lower than those formerly in use, was drawn up.[2] The judicial strength of the court had been already increased. The seal was in the hands of three commissioners—Whitelock, Keble, and Major Lisle—assisted by Lenthal the Master of the Rolls.

The Parliament was dissolved before the bill became law.[3] In 1654 Cromwell embodied many of its provisions in a set of ordinances which he directed the commissioners to enforce. As Mr Kerly remarks, "the principle upon which the ordinances are framed is a thorough distrust of the persons who would have to enforce them."[4] Nothing was left to their discretion. So far was this carried that the administration of any jurisdiction in equity was rendered almost impossible. Whitelock, Widdrington (who had succeeded Keble) and Lenthal protested against them. Some of their objections were captious. They objected, for instance, to the rule requiring the commissioners to sit at the same time as the Master of the Rolls. But others were reasonable. It was clearly impossible to obey the rule that all causes should be heard and determined on the day on which they were set down, because, as the commissioners pointed out, "equity causes depend upon so many circumstances in cases of fraud, that ofttimes three or four days are not sufficient for the

[1] Cited C. P. Cooper, Chancery, 7, 8, cp. Harl. Miscellany iii 558 and v 156.
[2] Somers, Tracts, vi 202-211.
[3] Campbell, Chancellors, iii 53-55.
[4] Equity 161.

orderly hearing of a single cause."[1] Cromwell, however, insisted upon obedience to the ordinances as they stood. Lenthal yielded; but Whitelock and Widdrington declined to obey. They were replaced by Colonel Fiennes. The seals were thus in the hands of two military officers, Colonel Fiennes and Major Lisle. Two years after, the ordinances were allowed to lapse. Matters were then still further complicated by the claims of the old officials to return to their places. In 1658 a bill for regulating and limiting the jurisdiction of the Court of Chancery was lost by a hasty dissolution.

The Restoration brought back the old system in its entirety. The aims of the reformers were good. But they failed to accomplish their aims because they lacked the support of those who possessed the technical knowledge requisite for effective reform. The confusion which resulted replaced the desire for reform by the desire for any kind of permanent settlement. In the history of the failure of the projected law reforms of the commonwealth statesmen we may read the history in little of the failure of the Commonwealth itself.

(iii) The period after the Great Rebellion.

The same abuses prevailed in the court after the Restoration. They prevailed in an aggravated form owing to the increase in its business. This increase was due partly to the abolition of the courts of Request and Star Chamber,[2] partly to the fact that bankruptcy business was beginning to be brought within the jurisdiction of the Lord Chancellor, partly to the increase in the wealth and commerce of the country.

(*a*) There had been no increase in the judicial strength of the court. In 1688 the scheme of putting the seal permanently in commission was seriously considered. But the experiment was not found to work satisfactorily. The immense pressure of work is said to have ruined the health of several Lord Chancellors and Lord Keepers. It proved fatal to Lord Talbot.[3] The development of the system of Equity caused the more distinguished lawyers to take such pains with cases, which were likely to be leading, that both

[1] Parkes, App. 465, has printed the ordinances with the commissioners' objections; cp. Campbell, Chancellors, iii 58-60.

[2] A book had been published in 1653 by John March showing that the abolition of the courts of Wards and Requests had occasioned an increase in the business of the Chancery, and advocating an increase in the judicial staff, Parkes 195.

[3] C. P. Cooper, Chancery, 14-16.

the duration of the causes which were being heard, and the arrears of causes waiting to be heard continued to increase. Lord Hardwicke (1736-1756) was, next to Lord Eldon, the most eminent judge who has ever presided in the Court of Chancery. But, "his decrees were very few in comparison to the many causes that came under discussion in that court in his time. The hearings, rehearings, references to masters, reports and exceptions to those reports, exorbitant fees to counsel, and the length of time to which every cause was protracted, made the suitors weary, and glad to submit to any decree suggested and agreed upon by their counsel."[1]

The delays under Lord Eldon were notorious. They arose partly from the desire to so carefully consider each case that permanent and final justice should be done; and for this reason it must be admitted that to some extent the delays which troubled the suitor were a permanent gain to the system of equity. No man in the kingdom worked harder than Lord Eldon.[2] Though we may rightly think that he might have lent the weight of his name to reforming a system which was antiquated, we should remember that he did his best with the system as it was. Though he was blind to its defects, and blind to the criticisms passed upon it, and upon himself, he tried his hardest to work with a system he honestly thought it was dangerous to change.[3] The delays partly also arose from a dilatory habit of mind which tended to grow upon him, at a time when the expanding population and commerce of the country were bringing into still stronger relief the defects of the court.[4] A judge should, it is true, take time to consider a doubtful case. But Lord Eldon would often express a clear opinion after hearing the argument, and then, as Campbell says,[5] "he expressed

[1] Cooksey, Sketches of an essay on the life of Hardwicke, cited C. P. Cooper, Chancery, 16, 17.

[2] The Chancery Commissioners of 1816 (Parl. Papers 1826, vols xv, xvi) at p. 8 say, "During some years the Lord Chancellor has been required to attend the judicial business of the House of Lords three mornings, and latterly two mornings in the week; and during the last two years the Lord Chancellor, and the Master of the Rolls as deputy-speaker of the House of Lords have been required to devote five mornings in each week to attendance on judicial business in the same high tribunal; a measure of great benefit to suitors in that house, but which has produced great delay in the business of the Chancery suitor."

[3] Campbell, Chancellors, vii 637-639.

[4] 1745 the money in court was £1,723,957, 10s. 1d.; 1825 it was £39,174,722, 8s. 7d, C. P. Cooper, Chancery, 104 n.

[5] Chancellors vii 625. Ibid. 626 it is said that a solicitor's bill contained the following item, "To attendance on the Lord High Chancellor of Great Britain in his private room, when his Lordship begged for further indulgence from me till

doubts—reserved to himself the opportunity for further consideration—took home the papers—never read them—promised judgment again and again—and for years never gave it—all the facts and law connected with it having escaped his memory." Yet Romilly, from large personal experience, said that however long he took to consider a cause, he had rarely known him differ from his first impression.

The existing delays were aggravated by the system of rehearings and appeals which a determined litigant could demand upon the most trivial points. Any point arising in the course of a suit might be discussed—(1) Before the Master of the Rolls; (2) Before the same person by way of rehearing; (3) Before the Lord Chancellor; (4) Before the Lord Chancellor by way of rehearing; (5) Before the House of Lords. Upon such appeals and rehearings, contrary to the usual rule, new evidence could be adduced. This was clearly a practice which tended to still further lengthen the proceedings. Mr Beames, the secretary to the Chancery commission of 1816 justly says, "a right of litigation which is limited alone by the means of gratifying it, places the poor suitor at the mercy of his rich antagonist; and at the same time operates this hardship upon the other suitors of the court, that their causes are necessarily postponed to make way for the discussion and rediscussion of the same question between the same parties." [1]

At the latter part of Lord Eldon's tenure of office the arrears of business grew so great that the business of the court declined.[2] In fact the time consumed in merely

tomorrow—16s. 4d." Some verses (cited ibid 640) give a good picture of an ordinary day in court.

Mr Leach
Made a speech,
  Angry, neat, but wrong;
Mr Hart,
On the other part,
  Was heavy, dull, and long:
Mr Parker
Made the case darker,
  Which was dark enough without:
Mr Cook
Cited his book,
  And the Chancellor said—I doubt.

[1] Report of the Chancery Commission 112, 113.

[2] C. P. Cooper, Chancery, chap. vii. Sir L. Shadwell, in his evidence before the Chancery Commission, said, "The load of business now in court is so great that three angels could not get through it." Mr Bickersteth said that the delay between setting the cause down, and the hearing, exceeded all the other unnecessary delays put together.

waiting to be heard amounted to a denial of justice. The appointment of a Vice-Chancellor in 1813 did not, for causes which will be dealt with later, afford any material relief. C. P. Cooper writing in 1828 said,[1] "two briefs in causes on Further Directions set down before the Vice-Chancellor are at this moment on my table. The real and personal estates in both cases are considerable, and neither the legatees nor residuary legatees have yet received any part of their bequests. In one suit the bill was filed rather more, and in the other rather less than 20 years since, and, during more than half that time, the causes have, in different stages, been waiting their turn to be heard."

(*b*) The abuses connected with the subordinate officials of the court tended to increase.

The sale of the office of Master was carried on with greater eagerness as the value of the office rose.[2] The barefaced way in which these transactions were carried out is illustrated by some of the evidence given upon Lord Macclesfield's impeachment for corruption. The following is a typical instance. Master Elde deposed that he had offered the Chancellor £5000 for the post. Cottingham (the Chancellor's agent) stood out for guineas. "I immediately went to my Lord's, being willing to get into the office as soon as I could. I did carry with me 5000 guineas in gold and bank notes. I had the money in my chambers, but did not know how to convey it; . . . but recollecting I had a basket in my chambers, I put the guineas into the basket and the notes with them. I went in a chair and took the basket with me in my chair. When I came to my Lord's house I saw Mr Cottingham there, and gave him the basket, and desired him to carry it up to my Lord. I saw him go upstairs with the basket, and when he came down he intimated to me that he had delivered it. When I was admitted, my Lord invited me to dinner and some of my friends with me, and he was pleased to treat me and some members of the House of Commons in a very handsome manner. I was, after dinner, sworn in before them. Some months after I spoke to my Lord's gentleman, and desired him if he saw such a basket he would give it me back. He did so, but no money was returned in it."[3]

The value of the office at the Revolution was £1000. At the beginning of the 18th century it was £6000. The reason

[1] Chancery 92
[2] Life of Lord North i 297, 298.
[3] Campbell, Chancellors, iv 542, 543.

was that the money in court was under the absolute control of the Master, who was not bound to account for any interest received.[1] As the money in court was constantly increasing, the interest formed a handsome addition to the Master's income. But they were not content with this. They tried to increase their incomes still further by speculation.

Shortly after the bursting of the South Sea Bubble (1725) rumours were heard that all was not right with the money in court.[2] An enquiry was ordered. In consequence of that enquiry the Lord Chancellor, Lord Macclesfield, was impeached. A deficit of £82,301, 19s. 11½d. was discovered. Two acts were passed which deprived the Masters of the control of the suitors' money, and placed it in the Bank of England under the control of a new official called the Accountant-General of the court of Chancery.[3]

After this episode it was impossible to sell again the office of Master. But it was still regarded as a piece of patronage belonging to the Lord Chancellor. It was stated in 1826 that the Lord Chancellor had appointed an officer in the militia who had not been engaged in ten cases of importance in his life.[4]

The Six Clerks still continued to draw salaries ranging from £885 to £2000 a year for their two months' work in the year.[5] From the evidence given before Lord Eldon's commission in 1816 it would appear that their sole duties were to file and preserve the records, to certify the court respecting them, and to sign copies. Even these duties were not, and need not, be adequately performed. At the beginning of the 19th century a considerable quantity of the records had been stolen and sold for waste paper. The court had held that they were not responsible for the correctness of the copies which they signed and for which they took fees.[6] Their witness (Mr Vesey) when examined before the commission of 1816, stated that questions of difficulty might arise, the determination of which might necessitate the presence of the whole six; but he was wholly unable to give any specific instance of the occurrence of any such case, or to imagine any question more important than the propriety of an engrossment.[7]

Throughout the offices of the Masters, the Six Clerks, the Examiners and the Registrars, the abuses arising from their

[1] Parkes 283. [2] Campbell, Chancellors, iv 535-538; Parkes 293, 299.
[3] 12 Geo. I. c. 32; 12 Geo. I. c. 33.
[4] Letter to the *Times*, cited Parkes, App. 584. [5] Parkes, App. 575.
[6] Ibid 575, 576. [7] Ibid 576, 577.

payment by fees for office copies which were not required, continued to exist in an aggravated form. The extent of these abuses is very clearly explained in a tract of 1707.[1] "It seems," says the writer, "very ridiculous that anyone should be obliged to take and pay for copies of what he before had, or has no occasion for at all, and yet this is the case here; for everyone must take copies of interrogatories (which are of themselves of no use) if he will have copies of the depositions for which he has occasion; nay every person is now obliged to take copies of the interrogatories exhibited by himself (and often twice over, both from the Examiners' and Six Clerks' office) although he had the original before, if he will have a copy of the depositions taken thereon." Similarly suitors were obliged to pay for copies of reports and certificates for which they had no occasion. The registrar's deputies expanded the orders (sometimes inserting the whole of the counsel's brief) to increase the fees. "And as the length of the orders increases the charge, so it does the delay, which gives birth to the new perquisite of expedition money." The insertion of such matters merely misled the parties and led to further rehearings and appeals.[2] The evidence given before the commission of 1816 showed that the same abuses still existed. The following evidence was given by Mr Lowe, a solicitor: "What do you mean by being on good terms with the registrar? Taking office copies. Do you ever take them when they are not wanted? They are never wanted. It is quite idle to think that an office copy is ever wanted. Are not the copies now taken for the purpose of conferring a benefit on the registrar? Entirely so—nothing else. Do the registrars expect the parties to take copies? They do not take money; but the office copy is the registrar's hood."[3]

We are not surprised to get a consensus of evidence

[1] Reasons for passing a bill for preventing delays and expenses in suits in Law and Equity, Harleian Misc. xi 49, 53-55. The party paid, for bills and answers, 8d. a sheet to the six clerks' office; 3s. a side for recitals from the registrar's office; and about 2s. a side for like recitals from the six clerks' office if the decree were enrolled—so that he paid three times for the same thing. The same thing went on throughout the Chancery offices. The affidavit office, formerly sold for £250, was in 1707 reckoned to bring in £1000 a year. This state of things tempted solicitors to charge for copies they never got, Life of Lord North i 32, 33.

[2] Reasons, etc., 55. "Most of the suggestions of the bill are fictitious, and the answer frequently falsified by depositions (which are the real foundation of the decree, but are never recited therein) so that the recitals of a fictitious bill and untrue answer, rather give the decree an aspect of injustice . . . and often times drew the parties into rehearings and appeals, upon a mistaken notion of the hardship of their case."

[3] Cited Parkes, App. 571.

throughout the 18th century that it was better to sacrifice just claims rather than embark upon a suit in equity.[1]

(iv) The reorganization of the court in the 19th century.

Before the beginning of the 19th century little had been done to adapt the archaic organization of the court to modern needs.[2] Clarendon and North issued some general orders. North attempted some reforms of practice, and perhaps if he had been longer in office, he would have effected more. It is difficult, however, to suppose that much could be done by Chancellors who "showed no disposition to retrench officers or the just profit of their places."[3] In 1691-92 an unsuccessful attempt was made in Parliament to regulate the abuses of the Six Clerks' office.[4] From 1729 to 1733 a committee of the House of Commons enquired into the fees of the officials of the court. It appeared that many new offices had sprung up since a committee had enquired into the subject in 1598. But it was found very difficult to say what officials were attached to the court or what were their fees.[5] In 1740 the committee recommended that a table of fees should be prepared, that easy remedies should be given against extortionate officials, that offices should not be bought and sold, that there should be no expedition money.[6] Hardwicke signed the report. But he introduced no measure of reform. During the latter part of the 18th century all projects of reform seem to have been abandoned. No general orders were made by any Chancellor from Hardwicke (1737-1757) to Loughborough (1793-1801).[7] In 1813 the increasing arrear of causes caused the creation of a Vice-Chancellor to assist the Chancellor in his equitable jurisdiction.[8] This measure did not give any material assistance in reducing the arrears. He could only decide cases specially delegated to him by the Chancellor. The parties could appeal to the Chancellor. More cases were decided. But there were so many appeals

[1] Reasons, etc., 50 (1707); Parkes 326, citing a work of 1750; C. P. Cooper, Chancery (1828) 112.

[2] The report of the Chancery commission of 1816 at p. 10 refers to Bacon's orders (1618); Coventry's orders (1625); the orders of Whitelock, Lenthall, and Keble (1656); Clarendon's orders (1661); and says, "There are many other detailed orders upon insulated parts of the practice, and upon the fees of the officers of the court. But these orders have not introduced any alteration in the general system, nor essentially in the practice of the court."

[3] Life of Lord North i 264. For an account of the court and the measures taken in his time see pp. 259-265. [4] Parkes 255.

[5] Ibid 307; Life of Lord North i 127.

[6] Parkes 313-317; Campbell, Chancellors, v 62-64.

[7] Campbell, Chancellors, v 455.

[8] 53 Geo. III. c. 24.

that the cause lists were as full as ever.[1] In consequence of repeated motions in Parliament a commission was appointed in 1816 to enquire into the state of the court. At the head of the commission was Lord Eldon. Though the inadequacy of the court to deal with the equity business of the country, and the defects in its organization were notorious, the commissioners stated that they were satisfied, "that much misconception has arisen relative to the causes of that delay which so frequently occurs in the progress of a Chancery suit; and that much of it is imputable, neither to the court, nor to its established rules of practice; but to the carelessness of some parties, the obstinacy or knavery of others, or the inattention or ignorance of agents. Under these impressions we proceed to consider by what alterations in the practice of the court of Chancery, the time expended, and the cost incurred, may be reduced beneficially for the suitors."[2] A commission acting "under these impressions" was hardly likely to effect much. Even the practice of making the parties take office copies was not entirely condemned.[3] The Six Clerks, it is true, were considered to be useless; and it was recommended that they should be used to tax costs.[4] Certain small amendments in practice were also recommended. The *Times* spoke truly when it said that the report of the commission was an apology for all the abuses of the court.[5] The root of the evil—the want of an adequate judicial staff—was not touched. Certain parts of the practice were improved by orders founded upon the proposals of the commissioners. That merely meant that the cause was ready for hearing the sooner, and so waited longer on the list for a hearing.[6]

It was not till after the Whig victory in 1832 that the reform of the court was seriously taken in hand. The changes made in the twenty years following placed the organization of the court upon an altogether new basis.

(*a*) Changes in the judicial organization of the court.

In 1831 the Bankruptcy jurisdiction was removed from the Lord Chancellor and give to a Chief Judge in Bankruptcy, assisted by three other judges and six commissioners. Appeals were taken to a court of review and from thence to the Chancellor.[7]

[1] C. P. Cooper, Chancery, 117; Report of the Chancery Commission of 1816, 37.
[2] Report 9. [3] Ibid 23. [4] Ibid 33.
[5] Cited Parkes, App. 530.
[6] C. P. Cooper, Chancery, 65-67.
[7] 1, 2 Will. IV. c. 56 § 1; 10, 11 Vict. c. 102 § 2, the court of review was abolished and its jurisdiction was handed over to a Vice-Chancellor.

In 1869[1] the London Court of Bankruptcy was established. The judge of it was called the Chief Judge in Bankruptcy. He was assisted by such other judges of the superior courts of law and equity as the Chancellor might appoint. The court was a court of law and equity, and the judge was given all the powers possessed by the superior courts of law and equity. Appeals from it were heard by the Lords Justices in Chancery.

In 1833 it was enacted that the Master of the Rolls should sit continuously, and his jurisdiction was extended to the hearing of motions, pleas and demurrers.[2]

In 1842 the equity jurisdiction of the court of Exchequer was transferred to the court of Chancery, and two additional Vice-Chancellors were appointed.[3]

In 1851 a court of appeal intermediate between the courts of the Vice-Chancellors and the Master of the Rolls, and the House of Lords was established. It consisted of two Lords Justices in Chancery and the Lord Chancellor if he liked to sit there. They could be assisted, on the request of the Lord Chancellor, by the Master of the Rolls, the Vice-Chancellors, or any of the judges. They heard appeals from the Vice-Chancellor and the Master of the Rolls; and to them was given the jurisdiction of the Lord Chancellor to hear Bankruptcy appeals.[4]

Thus the court of Chancery consisted (1) of the three Vice-Chancellors and the Master of the Rolls sitting as judges of first instance. The court of first instance in Bankruptcy was the London Court of Bankruptcy; (2) of the Lords Justices in Chancery, who were usually assisted by the Master of the Rolls, sitting as a court of appeal in equity and bankruptcy; and (3) of the House of Lords.

(*b*) The reform of the official staff of the court.

In 1833 the appointment of the Masters was transferred to the crown. Their jurisdiction was defined. They were to be paid by a fixed salary; and the taking of any fee or gratuity was made an indictable offence. It was provided that no suitor need take office copies. The court fees were fixed and lowered. It was provided that the Six Clerks should be gradually reduced to two.[5]

In 1842 the Six Clerks and other useless officers were abolished. It was provided that costs should be taxed by a

[1] 32, 33 Vict. c. 71. [2] 3, 4 Will. IV. c. 94.
[3] 5 Vict. c. 5. It was thought that only one of these Vice-Chancellors would be permanently needed. It was found later that two were permanently needed, and provisions were made accordingly, 14, 15 Vict. c. 4 § 1; 15, 16 Vict. c. 80 § 52.
[4] 14, 15 Vict. c. 83. [5] 3, 4 Will. IV. c. 94 §§ 13, 16, 19, 28, 41.

law. It follows, that as there was no distinct line drawn between the two forms of procedure used in the Chancery, so there was as yet no distinct line drawn between the cases which fell under either procedure. Proceedings are begun by bill which would in later times have fallen under the common law jurisdiction of the court.

The distinction is becoming more clear at the end of the 15th century. This is clear from a case reported in 1469.[1] The Chancellor, putting the case of an official privileged to be sued only in the Chancery, said that he might use either his legal or his equitable jurisdiction; "for if it appear upon the matter showed in the suit that there is conscience, he may judge thereof according to conscience." But all the judges denied that he could admit considerations of conscience in a case which ought to be ruled according to the common law. Stamforde, writing in 1590, states that there were two opinions upon this point in Edward IV.'s day.[2] He inclines to the opinion that merely equitable defences did not avail in matters falling within the common law jurisdiction of the court; but he gives no decided opinion. When Coke wrote his Fourth Institute the distinction was clearly settled in its modern form.[3] "In the Chancery," he says, "are two courts, one ordinary, wherein the Lord Chancellor . . . proceeds according to the right line of the laws and statutes of the realm . . . another extraordinary, according to the rule of equity." After describing the extent of the common law jurisdiction he points out its relation to the jurisdiction of the Common Law Courts. "If the parties descend to issue, this court (the Chancery) cannot try it by jury, but the Lord Chancellor . . . delivereth the record by his proper hands into the King's Bench to be tried there . . . and after trial had, to be remanded into the Chancery, and there judgment to be given. But if there be a demurrer in law it shall be argued and adjudged in this court (the Chancery). . . . Upon a judgment given in this court a writ of error doth lie returnable into the King's Bench."[4]

[1] Y.B. 8 Ed. IV. Trin. pl. 1; Ellesmere, Office of the Chancellor, 45, 64.

[2] L.Q.R. i 454.

[3] 4th Instit. 79, 80. He notes that on the common law side of the Chancery "the legal proceedings be not enrolled in rolls, but remain in filaciis, being filed in the office of the Petty Bag."

[4] Dyer 315 a; Coke, 4th Instit. 80; Ellesmere, Office of the Chancellor, 76. Y.B. 27 Hy. VIII. Trin. pl. 6, the question arose in the Chancery, but was not decided. The rule was questioned by Plowden 393 (marginal note) and denied in the King v Carey (1682), 1 Vern. 131. Blackstone, iii 48, says he has seen no traces of such a writ since 1572.

The following classes of cases fell within the common law jurisdiction of the Chancellor:—(*a*) Pleas of scire facias to repeal letters patent, or upon recognisances.[1] (*b*) Executions upon recognisances, or statutes merchant or staple.[2] Palgrave states that this branch of the jurisdiction originated in the practice of enrolling covenants, grants, releases, etc., on the close rolls, and of securing their performance by deeds of recognisance acknowledged in Chancery; "the power of issuing the writs of execution belonged to the court, and thus it was authorized to judge of the default by which the recognisance was forfeited."[3] (*c*) Petitions of right, and monstrans de droit to recover property from the crown; and traverses of office found for the crown.[4] (*d*) Personal actions brought by or against officers of the court. (*e*) Cases in which the king, or a grantee of the king, was concerned fell within this jurisdiction, as it was always in the power of the crown to sue in what court he pleased.[5] Many of these cases are connected with the king's right to the incidents of military tenure. Much of this business disappeared with the creation of the Court of Wards.[6]

(2) *The equitable jurisdiction of the Chancellor.*

We have seen that at the end of the 15th century the various species of jurisdiction exercised by the Chancellor and the Council are beginning to divide themselves into certain definite classes. The cases which could not be dealt with because the law itself was at fault are the cases which give rise to the Chancellor's equitable jurisdiction. His relation to the now developed system of the common law was similar to that of the justices of the Curia Regis to the older local courts. He acted, as they had acted, on behalf of a king, bound by his office to do right and justice to his subjects. The reason why his interference is needed is, "for that man's actions are so divers and infinite, that it is

[1] 4th Instit. 80; Bl. Comm. iii 47, 48; Spence i 336. For the writ see App. XI.

[2] A recognisance is defined to be "a writing acknowledged by the party to it before a judge or officer having authority for the purpose, and enrolled in a court of record," Anson, Contracts (8th ed.) 59. Statutes merchant and staple, were modes of charging lands with the payment of a debt, 11 Ed. I.; 13 Ed. I. St. 3; 27 Ed. III. St. 2; 23 Hy. VIII. c. 6.

[3] Council 95.

[4] A Monstrans de droit lay, where, a title having been found for the king by matter of record, the party could show that the record, if properly understood, or if corrected in accordance with the facts, really showed a title for himself, The Banker's case 14 S.T. 77-79. The traverse of office was a similar proceeding. In all other cases the party was obliged to proceed by petition of right, ibid 82, 83.

[5] Spence i 337; Bacon's argument on the case De Rege Inconsulto, Works, vii 701.

[6] 32 Hy. VIII. c. 46; 4th Instit. 188.

impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances."[1] It is clear that a jurisdiction resting upon such a foundation will be at first very vague. It tended to become more fixed with time. The question then arose, what was its relation to the jurisdiction of the Common Law Courts. This question was settled by James I.; and having been settled, the principles of equity, though modified by changes in manners and modes of thought, and even by changes in the common law itself, attained a large part of the fixity and technicality of the law which they had started by attempting to modify.

To write fully of the equitable jurisdiction of the Chancellor would be to write the history of equity itself. The briefest sketch only can be here attempted. The subject falls naturally and chronologically into three periods:—

(*a*) Equitable jurisdiction up to the beginning of the 17th century.

(*b*) The conflict between the Court of Equity and the Courts of Common Law.

(*c*) The modern development of the equitable jurisdiction.

(*a*) Equitable jurisdiction up to the beginning of the 17th century.

Blackstone accurately sums up the condition of the equitable jurisdiction at the end of the 15th century, when he says[2] that "no regular judicial system at that time prevailed in the court; but the suitor when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the Chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman." In the course of the 16th century we begin to be able to distinguish certain principles upon which the Chancellor based his interference. The development of these principles was naturally assisted by the growing organization of the court.

(1) Uses and trusts were one of the earliest, and continued to be the most important of the branches of the equitable jurisdiction.

The word use comes from the Latin *opus* through the old French *os* or *oes*.[3] It is at first used loosely and generally to signify that property is held or received "on account of"

[1] Earl of Oxford's case (1616) 1 W. and T. 730, 733 (Ed. 1897). [2] Comm. iii 53.
[3] P. and M. ii 226. For different meanings of the term at earlier times see ibid 231-236; and Select Pleas of the Jewish Exchequer (S.S.) 53, 67, 68, 69, 72, 88, 94, 96.

another. Thus lands are surrendered to the lord to the use of the incoming tenant. Money is received to the use of another. Land is given by one who is going to the Holy Land "ad opus puerorum suorum." It is probable that the receipt of property on account of the heirs of some person is common to old Germanic law. The Salman of German law was a person to whom property was transferred in order that he might convey it according to the grantor's directions. He held it on account of the testator or of his heirs.[1]

This general idea of one person holding property on account of another developed in different directions. In the case of personalty the ownership of the person on whose account the property is held is recognised by the common law. The agent who converts to his own use his employer's goods has committed a wrong.[2] In the case of realty the law was otherwise. Actual seisin only was fully protected. Wills of land were forbidden, so that an executor holding on account of a testator or his heirs is unknown. But though the law declined to recognise the position of the person on whose account the land was held, land still continued to be conveyed to the use of others, in the belief that faith would be kept. The attempt of the Franciscans to live without property made such arrangements common. The interest of the body to whose use the property was conveyed was not recognised by the courts. It was therefore not property; but it answered all the purposes of property.[3] The Ecclesiastical Courts would no doubt have liked to protect such arrangements on the ground that their violation involved a breach of faith. But from Henry III.'s reign they had always been met by writs of prohibition, if they attempted to interfere where land was in question.[4] But in spite of the refusal of the Common Law Courts, and of the inability of the Ecclesiastical Courts to protect such arrangements, they continued to be made. The causes are well summed up by Bacon.[5] "Now for the causes whereupon uses were put in practice Mr Coke in his Reading doth say well that they were produced sometimes for fear, and many times for fraud; but I hold that neither of these causes were so much the reasons of uses as another reason in the beginning, which was, that the lands by the common law of England were not testamentary or devisable."

[1] L.Q.R. i 163, 164. [2] P. and M. ii 227. [3] P. and M. ii 229, 235.
[4] Bracton's Note Book Cases 50 and 1893; L.Q.R. i 168.
[5] Reading on the Statute of Uses (Works vii 409). The earlier statutes framed to prevent fraudulent or illegal practices by their aid are, 50 Ed. III. c. 6; 1 Rich. II. c. 9; 2 Rich. II. St. 2 c. 3.

The use at length found protection in the Chancery. No doubt the early Chancellors were ready to do as Chancellors what they had failed to do as ecclesiastics. Having assumed jurisdiction over the use, they proceeded to develop the conception. The use was at first regarded as being in the nature of a chose in action, as the benefit of a sort of contract.[1] It was held in Edward IV.'s reign that the c.q. use could only enforce the use as against the feoffee to uses. His remedy was, in the course of the 15th century, extended to reach the heirs of the feoffee and his alienees with notice.[2] Similarly though the heirs of the c.q. use could sue, neither wife, husband, nor creditor were allowed to do so. Gradually however equity began to regard the use as a kind of ownership.[3] Rules were laid down for its creation. It could be held for estates similar to those recognised by the common law. It could be alienated in ways unknown to the common law.[4] It can be stated perfectly generally in the Doctor and Student that, "every man that hath lands hath thereby two things in him, that is to say the possession of the land, which after the law of England is called the frank tenement or the freehold, and the other is thereby authority to take the profits of the land."[5] It was, as we have seen, in the case of land that uses were most common.[6] But as the doctrine of the uses developed, the use of chattels was equally protected.[7]

The use thus comes to be a form of equitable ownership originating in and fashioned by the equitable jurisdiction of the Chancellor. This form of equitable ownership became so common that statutes were passed to regulate it. A statute of Richard III.'s reign made the conveyance of the c.q. use binding against himself and his heirs.[8] Statutes of Henry VII.'s reign made his interest liable to his creditors, and to the feudal incidents.[9] In Henry VIII.'s reign a statute was

[1] See Coke's definition, Co. Litt. 272 b, and cp. 4th Instit. 85; Holmes, Common Law, 407-409.

[2] Y.B. 8 Ed. IV. Trin. pl. 1; 22 Ed. IV. Pasch. pl. 18; Spence i 445.

[3] Bacon, Reading (vii 401), "It is a shorter speech to say that *usus est dominium fiduciarium*: use is an ownership in trust." Cp. Co. Litt. 272 b. "Cestui que use had neither jus in rem or jus ad rem, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by subpœna in the Chancery."

[4] Bacon, Reading (vii 401-407); Spence i 454-456.

[5] Bk. II. c. 22. This treatise was written by St Germain. It was first issued by Rastall in Latin in 1523 under the title Dialogus de Fundamentis legum et de Conscientia. It was reprinted in English in 1530 and 1531.

[6] See list of cases in Select Cases in Chancery (S.S.) xxxvi-xxxix.

[7] Ibid no. 72; Wilflete v. Cassyn, Cal. ii xxxiii (Hy. VI.), both cases which suppose that a feoffee is holding goods in trust.

[8] 1 Rich. III. c. 1.

[9] 1 Henry VII. c. 1; 19 Henry VII. c. 15.

passed to more effectually restrain gifts in mortmain by way of use.[1] In 1535 the Statute of Uses was passed with the intention of wholly abolishing this dual ownership in cases where one person was seised of lands or other hereditaments to the use of another.[2] It is clear that this would have much curtailed the equitable jurisdiction of the Chancellor. We shall see that the growing jurisdiction of the Chancellor was beginning to call attention to the differences between common law and equity. It may be that in the first quarter of the 16th century there was some danger that the mediæval common law, with its technical rules, and its jargon of law French, would be obliged to defend itself against a newer system of jurisprudence administered in the Council and the Chancery.[3] At any rate the Statute of Uses shows that the common law had still an abundant vitality.[4] It did nothing less than capture for the common law the more important of those uses, which had become a new species of property under the fostering hand of the Chancellor. It is true that the statute did not fulfil the intentions of its framers. Its intent is well expressed in its title—statutum de usibus in possessionem transferendis. "Wherein Walmsley, J., noted well—That if a man look to the working of the statute he would think it should be turned the other way, de possessionibus ad usus transferendis."[5] That is the gist of the matter. Uses might be turned into legal estates; but the legal estate was invested with some of the volatile properties of the use. The power of devising real estate, wherein the working of the statute would have answered the intention of its framers, was partially restored. The decision in *Tyrrel's case* (1557)[6] restored the old distinction between legal and equitable estates. The Chancellors were left free to mould as they pleased their new trust estates. That these things should have been possible shows that a feeling existed against the strict common law principles contained in the preamble of the Statute of Uses.

(2) The Chancellor interfered in cases of contract upon principles different from those of the common law.[7]

We have seen that the ecclesiastical bias of the Chancellors

[1] 23 Henry VIII. c. 10. [2] 27 Henry VIII. c. 10.
[3] Maitland, English Law and the Renaissance, 16-22.
[4] The "Reply of a serjeant to the Doctor and Student" was written about the year 1523 (Harg., Law Tracts, 323). It represents the strict common law view. His strictures on uses at p. 328 are very similar to the preamble to the statute.
[5] Bacon, Reading (vii 417). [6] Dyer 155 a.
[7] L.Q.R. i 171-174; v 235-241.

led them to interpose, in the interests of good faith and honest dealing, to protect the interest of the c.q. use. The view which they took of contracts, and the remedy of specific performance, by which they enforced them, are even more directly due to the same cause.

The Ecclesiastical Courts asserted a jurisdiction wherever there had been a "læsio fidei." "To pledge the faith was to create an obligation cognizable in the spiritual courts, and enforcable by penitence or excommunication. Accordingly we find in the Middle Ages that the pledge of faith (fidei interpositio—fides facta) was a common sanction to engagements of various descriptions."[1] As early as the Constitutions of Clarendon the lay courts prohibited any such interference with contracts falling within their jurisdiction.[2] But the Ecclesiastical Courts continued to claim jurisdiction; and one of the two contending parties did not hesitate even to tamper with a statute in order to maintain their claim.[3] Where these courts interfered they attempted to compel the actual fulfilment of that which had been promised.[4] But they were unable to effectually assert their jurisdiction in the face of writs of prohibition.

The ecclesiastical Chancellors, however, carried these principles with them into the court of Chancery. It is said in the Diversité des Courtes "a man shall have remedy in Chancery for covenants made without specialty if the party have sufficient witness to prove the covenants."[5] In Edward IV.'s reign a case is reported showing clearly the connection between the old ecclesiastical and the new equitable jurisdiction. The defendant had promised *per fidem* to indemnify the plaintiff, and did not fulfil his promise. The plaintiff sued by writ of subpœna in Chancery. The Chancellor overruled the objection that there should have been a deed, or that action should have been brought in the Court Christian.[6] The Courts of Common Law, however, were about this time extending the action of assumpsit; so that equitable inter-

[1] L.Q.R. v 236.

[2] § 15. Placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitia regis.

[3] "The two versions of the great statute Circumspecte agatis (13 Ed. I. St. 4) the one saving to the Courts Christian jurisdiction in such actions, and the other denying it to them, are evidences of the zeal with which the contest was carried on: for the true text must almost certainly have been tampered with and falsified by the one party or the other in order to support its contention," L.Q.R. v 239, 240.

[4] Ibid 241.

[5] Cited Kerly, Equity, 88. The date of the work is 1525.

[6] Y.B. 8 Ed. IV. Pasch. pl. 11.

ference became unnecessary in the generality of cases. But it continued to be both necessary and useful where specific performance was desired. In 21 Hy. VII. Fineux, C.J.,[1] said, that if one bargain that I shall have his land to me and my heirs for £20, and I pay, I may have action on the case, and need not sue out a subpœna. But to this Brooke adds a note, "by this he will get nothing but damages, but by subpœna the Chancery can compel him (the defendant) to convey the estate, or imprison him, *ut dicitur*."[2]

In fact the principle upon which the Chancellor interfered was altered. He did not interfere merely if there was breach of faith, unless a contract was proved. The principle of his interference came to be, rather the inadequacy of the common law remedy, than the inadequacy of the common law conception of contract.[3] It was not settled, however, in the 16th century what cases called for the interference of the Chancellor. Specific performance of contracts to convey chattels or even to do acts was decreed.[4] The court was as yet free to act wherever it considered that a decree would meet the ends of justice. It maintained this position in spite of Coke's contention that a decree for specific performance was unjust to the defendant, as it deprived him of his election, either to pay damages, or to fulfil his promise.[5] It was not until the 18th century that the jurisdiction to grant specific performance was definitely restricted to cases in which damages would not be an adequate remedy.[6] This is a restriction which has led to the application of the remedy chiefly in the case of contracts for the sale of interests in land.

(3) The Chancellor interfered in a class of cases where, owing to the rigidity of the law, the enforcement of the strict legal right was clearly contrary to equity.

Fraud, forgery and duress were some of the chief grounds of his interference.[7] Even after judgment at law he would issue an injunction against the enforcement of the judgment;[8]

[1] Y.B. 21 Hy. VII. Mich. pl. 66.

[2] Cited Fry, Specific Performance (Ed. 1892) 15. The older local courts used to give this remedy, the Court Baron (S.S.) 115; but this was the court of a Bishop.

[3] The statement in the Diversité de Courtes (above 242) was overruled, Cary. Rep. in Chy. 5.

[4] Kymburley v. Goldsmith (Hy. VI.) Cal. i *xx* (a ton of wood); Tyngelden v. Warham (Ed. IV.) Cal. ii *liv* (contract to build a house).

[5] Bromage v. Gennings, (1617) 1 Rolle 354, 368.

[6] Cuddee v. Rutter (1720) 2 W. and T. 416; McManus v. Cooke (1887) L.R. 35, C.D. 682.

[7] Select Cases in Chancery (S.S.) cases 8 and 9 (duress); 2 and 99 (fraud); Bief v. Dyer (Rich. II.), Cal. i *xi* (forgery).

[8] Spence i 674.

and this, as we shall see, gave rise to the contest between the court of Chancery and the Courts of Common Law. Such interference was very necessary. The Courts of Common Law allowed fraud to be set up as a defence. They were unable to order the cancellation and delivery up of documents obtained by fraud.[1] Thus if a bond had been wholly or partially satisfied, but not given up, the obligor might sue at law for the whole amount.[2] "The question at law is whether it were sealed and delivered or the like, and that being found by verdict, judgment followeth that the whole sum shall be paid; whereas the Chancery examineth, not the sealing and delivery of the bond, but what was at first due, what hath been paid since, what doth remain unpaid; and accordingly doth order the party to take but what is justly due unto him, with his damages and costs, and will not suffer him to take £800 because he had a judgment for so much, where it was proved that all was paid but £20, as the case was lately in Chancery."[3]

On similar principles the Chancellor would relieve against mistake, where an instrument had been drawn up which did not express the true intent of the parties;[4] or against accident, where, for instance, a money bond had imposed a penalty in case of non-payment by a day, and accident had prevented payment by that day.[5] After some conflict of opinion it was decided that the latter relief would always be given against penalties, if incurred by slight negligence.[6] It is not till later that relief is given against all penalties merely because they are penalties.[7] It is from this species of equitable interference that the equity of redemption springs. It was settled in James I.'s reign that the mortgager always had a right to redeem, although the mortgagee's estate was absolute at law.[8] In 1640 it was said that the court will relieve a mortgager "to the 10th generation."[9]

These three heads of equitable interference are beginning to become distinct in the later 16th and earlier 17th centuries. Before that period it is difficult to distinguish except in the roughest manner the various grounds upon which the Chancellor acted. In Edward IV.'s reign Fairfax, J., said, that if

[1] Spence i 623, 624.
[2] In Edward IV.'s reign there had been conflicting decisions as to whether equity would relieve in that case; it was ultimately settled that it would, Kerly, Equity, 90.
[3] Report of Cases in Chancery i App. 35.
[4] Spence i 633.
[5] Select Cases in Chancery (S.S.) no. 39; Atkinson v. Harman (Phil. and Mary) Cal. i *cxlii*.
[6] Spence i 602, 603.
[7] Kerly, Equity, 145, 146.
[8] Ibid 143.
[9] Bacon v. Bacon, Toth. 133.

the judges would give a proper extension to actions on the case, there would not have been so much occasion for the subpœna.[1] At that period this dictum was not so far from the truth as it became in later times. For reasons which we must now consider it became a very superficial view of the court's jurisdiction.

(4) The peculiar procedure of the court gave to it a protective and an administrative jurisdiction in cases in which the common law either could not act at all, or could not act with effect.[2]

The Chancellor could examine the defendant himself and enforce the discovery of any documents in his possession.[3] Such discovery was granted to aid both suits in equity and actions at law. "Where certainty wanteth, it was said in Henry VI.'s reign,[4] the common law faileth, but yet help is to be found in Chancery for it; for if the Queen grant to me the goods of A that is attainted of felony, and I know not the certainty of them, yet shall I compel any man to whose possession any of them come, to make inventory of them here." Similarly the court entertained suits to record evidence where there was ground to suppose that it might otherwise be lost.[5]

Just as the Chancellor's power over the person of the defendant enabled him to assist the conduct of legal and equitable proceedings, so it enabled him to give remedies which the Common Law Courts could not give. The decree for specific performance is one instance of this. Another is the issue of an injunction. The Courts of Common Law might give a remedy when the wrong had been done. They could not interfere to prevent it.[6] Such interference was an early subject of the Chancellor's jurisdiction.[7] Bills to prevent waste were common in Elizabeth's reign.[8] Others were filed to secure parties in the legal possession of their estates. It was by means of injunctions of this kind that the action of ejectment was made an efficient means of finally determining questions of ownership of land.[9]

The organization of the court of Chancery made it a tribunal much more efficient than the Courts of Common Law

[1] Y.B. 21 Ed. IV. Pasch. pl. 9. (23).
[2] Spence i 704-707.
[3] Select Cases in Chancery (S.S.) case 112; Hungerford v. Mayor of Wilton (Hy. VI.) Cal. i *xxxix*.
[4] Y.B. 39 Hy. VI. Mich. pl. 35, cited Spence i 678; 4th Instit. 85.
[5] Earl of Oxford v. Tyrell (Hy. VII.) Cal. i *cxx*. [6] Spence i 669.
[7] Select Cases in Chancery (S.S.), case 70; Wakeryng v. Baille (Ed. IV.) Cal. i *lxii*. [8] Spence i 671, 672. [9] Ibid 658.

in the investigation of matters of account. There was, it is true, an action of account at common law. But that action applied only to guardians in socage, bailiffs, receivers, or merchants. Even in these cases the superior machinery and remedies of the court caused it to gain practically an exclusive jurisdiction.[1] The cognisance of trusts naturally involved the taking of accounts.[2] Partnership, administration of the estates of deceased persons, and suretyship all became for this reason important heads of equitable jurisdiction.

(*b*) The conflict between the Court of Equity and the Courts of Common Law.

When two separate and partially competing jurisdictions exist in one state, a conflict between them is sooner or later inevitable. In Henry II.'s reign there had been such a conflict between the temporal and ecclesiastical jurisdictions. A similar conflict arose at the beginning of the 16th century between the courts of law and equity.

The nature and occasion of the conflict had been foreshadowed at the end of the 15th century. It had become clear that the law could not be modified upon equitable principles, unless the Chancellor possessed the power of restraining the parties from proceeding at law, or, if they had already done so, from enforcing judgment. From the time of Henry VI. there are instances of injunctions issued not only against the parties, but also against their counsel.[3] The judges were naturally hostile to a claim to treat them, by means of an injunction, as they were accustomed to treat other courts by means of a prohibition.[4] In Edward IV.'s reign Fairfax asserted that the King's Bench might forbid the parties from resorting to any other jurisdiction, if the case fell within the jurisdiction of the Common Law Courts.[5] In another case of the same reign, Hussey and Fairfax

[1] At law no discovery of the facts or documents could be got from the other party on oath; the proceedings were useless for the purpose of taking mutual accounts, as the court could not order the plaintiff to pay if the balance turned out adversely to him, Malynes, Lex Mercatoria, Pt. iii c. xvii; Spence i 649, 650; Select Cases in Chancery (S.S.) case 1.

[2] "Where a trust is confessed by the defendant's answer, there needeth no further hearing of the cause, but a reference presently to be made upon the account, and so to go on to a hearing of the accounts," Bacon's Orders, no. 53. Below 397-399 as to the Ecclesiastical Courts and administration.

[3] Spence i 674.

[4] There is a petition in 1422 that two judges should certify that the common law gives no remedy before a party can sue in Chancery. This would clearly have put the Chancery under the control of the law courts. The answer is that the statute 17 Rich. II. c. 6 (damages and costs) shall be observed, R.P. iv 189 (1 Hy. VI. n. 41).

[5] Y.B. 21 Ed. IV. Pasch. pl. 6 (p 23).

declared that if the Chancellor committed the parties for disobedience to an injunction, they would release them by Habeas Corpus.[1]

We have seen that in the 16th century the jurisdiction of the court was extended and consolidated. Louder complaints, therefore, were heard from the Common Law Courts. The frequency with which Wolsey issued injunctions was made one of the articles of his impeachment.[2] Sir Thomas More attempted to soothe the judges by a conference.[3] But this had little effect. The question had become so burning that it occasioned a literary controversy. The Doctor and Student discussed the relations between law and equity with a bias in favour of the equitable jurisdiction. It was answered by a serjeant who took the strict common law line.[4] "I marvail much," he says, "what authority the Chancellor has to make such a writ (injunction) in the king's name, and how he dare presume to make such a writ to let the king's subjects to sue his laws; the which the king himself cannot do right wisely; for he is sworn the contrary, and it is said *hoc possumus quod de jure possumus*."[5] He argues that the equity of the Chancellor is wholly uncertain and arbitrary; and that the Chancellors think the common law needs amendment, only because they are ecclesiastics, and know not its goodness. "I perceive, by your practice, that you leave the common law of the realm, and you presume much upon your own mind, and think that your conceit is far better than the common law; and therefore you make a bill of your conceit, and put it into the Chancery saying that it is grounded upon conscience."[6] This pamphlet was answered by the "Little Treatise concerning Writs of Subpœna."[7] It was argued that the Chancellor's jurisdiction was sanctioned by statute, by judicial decision, and by practice. The cases in which a subpœna lies are detailed, and the reasonableness of granting a subpœna in each case is shown. In Edward VI.'s reign we have a petition of the students of the common law to the Council complaining of the encroachments of the Chancery.[8]

[1] Y.B. 22 Ed. IV. Mich. pl. 21.

[2] Articles 20 and 21, 4th Instit. 91, 92. [3] More's life of More 166.

[4] Reply of a serjeant to the Doctor and Student, Harg., Law Tracts, 323. It was written about 1523. [5] At p. 325. [6] At p. 328.

[7] Harg., Law Tracts, 332. For those pamphlets see Reeves, H.E.L. iii 396-400, and Kerly, Equity, 90-93.

[8] Dasent ii 48, 49. "So it is . . . that now of late this Comen Lawes of this realme partely by injunctions, as well before verdictes jugementes, and execucions as after, and parteley by writts of Subpena issuing owte of the Kinges Courte of Chancery, hath nat been only stayed of their direct course, but also many times altrid and violated by reason of decrees made in the saide Courte of

In Elizabeth's reign the differences became acute. A barrister was indicted under the statute of Præmunire for applying for an injunction after a judgment at common law.[1] We have seen that in that reign the Common Law Courts had attacked the legality of the court of Requests. They could not, and did not, deny the legality of the court of Chancery; but they claimed to confine its jurisdiction within what they considered to be its legal bounds.

The matter came to a head in the reign of James I.[2] Coke decided in several cases that imprisonment for disobedience to injunctions issued by Chancery was unlawful. In one case, "it was delivered for a general maxim in law that if any court of equity doth intermeddle with any matters properly triable at the common law, or which concern freehold, they are to be prohibited."[3] The Courts of Common Law saw well enough that their supremacy was at stake. "If the party against whom judgment was given, might after judgment given against him at the common law, draw the matter into the Chancery, it would tend to the subversion of the common law, for that no man would sue at the common law, but originally begin in Chancery, seeing at the last he might be brought thither."[4]

On behalf of the Court of Chancery it was contended that these injunctions did not interfere with the common law. The judgment stood. All that the Chancellor was concerned with was the conduct of the parties to the case in which the judgment had been given. The conduct of the parties, it was contended with some force, had never been in issue in the court of common law.[5] This view is justified by cases of the type of *Courtney v. Glanvil*.[6] Glanvil had sold for £360 to Courtney a jewel worth £20. He had also sold to Courtney three other jewels for £100. He took a bond for the payment in the name of one Hampton. He then procured an action to be brought on the bond in Hampton's name. Judgment was by consent entered for Hampton, out of court,

Chauncery, moste grounded upon the Lawe Civile, and apon matter depending in the conscience and discrecion of the hearers thereof; who being Civilians and nat lerned in the Comen Lawes, determyne the waighty causes of this realme according either to the said Lawe Civile or to their own conscience."

[1] Spence i 675; Reeves, H.E.L. iii 735-737.

[2] Campbell, Chancellors, ii 241-245.

[3] Heath v. Rydley (1614) Cro. Jac. 335.

[4] Throckmorton's case (1598) 3rd Instit. 124, 125.

[5] Earl of Oxford's case, 1 W. and T. 730.

[6] (1615) Cro. Jac. 343. It is said in the Reports of Cases in Chancery i App. 43, "that not one judgment of a hundred is pronounced in court, nor the case so much as heard or understood by the judges, but entered by attornies."

in the vacation, Glanvil paying all the costs. On appeal this judgment had been upheld by the Courts of Common Law. Against its enforcement an injunction had been issued. Not, as Lord Ellesmere explained in the *Earl of Oxford's case*, "for any error or defect in the judgment, but for the hard conscience of the party." He pointed out, in the same case, that by writs of *audita querela* the judges did in some cases "play the chancellors" by reversing a judgment given.[1]

Coke treated such reasoning as a quibble; and he maintained that the jurisdiction claimed by the Chancellor was contrary to two statutes, the Statute of Præmunire 27 Ed. III. c. 1, and 4 Hy. IV. c. 23. Lord Ellesmere had little difficulty in showing, from the wording of the Statute of Præmunire, and from its connection with preceding legislation, that it referred to those who sued in ecclesiastical courts, not to those who sued in the king's courts. It applied to the court of Rome, and to those courts which, though locally within the realm, were, in the exercise of their jurisdiction, subordinate to foreign courts. The statute of 4 Hy. IV. c. 23 caused more difficulty. It recites that after a judgment in the king's courts, parties are summoned anew sometimes before the King himself, sometimes before the King's Council, and sometimes before the Parliament. It then enacts that after such judgment the parties and their heirs shall be in peace, unless the judgment be reversed by attaint or error. There was authority tending to show that the statute applied to proceedings in the court of Chancery.[2] Both in the Doctor and Student[3] and in the Treatise on the Subpœna[4] this view seems to be taken. Lord Ellesmere argued that it applied only to matters determinable at common law by way of legal proceeding, and not to proceedings in the Chancery as a court of equity. He relied upon the fact that the Chancery is not specifically mentioned in the statute; and he said that, if it were, it is not the judgment which is examined, but the conduct of the parties and the equity of the case.[5]

James I. referred the matter to Bacon, then Attorney-

[1] It was urged in the Earl of Oxford's case (at p. 736) that, the judgment in that case being based on a statute, no injunction could issue. Ellesmere retorted with much effect that Coke himself in Bonham's case had said (8 Rep. 118) "that the common law can control Acts of Parliament if they are against right and reason, repugnant, or impossible to be performed."

[2] Beck v. Hesill (Hy. VI.) Cal. ii *xii.*

[3] Bk. I. c. 18.

[4] Harg., Law Tracts, 348.

[5] Earl of Oxford's case 1 W. and T. at pp. 737, 738. But cp. Ellesmere's Office of the Chancellor 49, 50, and Treatise on the Privileges and Prerogatives of the High Court of Chancery.

General, and other counsel, to advise. They advised that there was a strong current of authority since the reign of Henry VII. in favour of the issue of injunctions after judgment, and even after execution; that there were cases in which the judges themselves had advised the parties to seek relief in Chancery;[1] and that the practice was not contrary to statute.[2] In accordance with their opinion, James issued an order in favour of the Chancery.[3] It may be that the decision was slightly tinged by political considerations.[4] The common law judges, especially Coke, were already tending to manifest an independence opposed to James's absolutist claims. The Chancellor, as a minister of state, was more favourable to these claims. But, looking at the rigid practice of the Courts of Common Law at that period, it cannot be said that the views for which the Chancellor contended were unreasonable.

Though the controversy was practically settled by James's order, it lingered on during the rest of the 17th century. It was said in 1655 that, in the Long Parliament, the House of Lords had ruled that the statute 4 Henry IV. c. 23 applied to proceedings in Chancery.[5] In 1658 the court heard a two days' argument on the subject.[6] In 1670 proceedings were taken upon 27 Ed. III. c. 1. The case was adjourned to the Exchequer Chamber; but Hale thought that the statute did not apply, and the matter dropped.[7] In 1673 an application was made for a prohibition to the court of Chancery based on 4 Henry IV. c. 23. Hale directed that the case should be set down for further argument.[8] In 1695 Sir Robert Atkyns, late Chief Baron of the Exchequer, wrote a pamphlet maintaining, that the Common Law Courts could and ought to restrain equitable interference with their jurisdiction, by the issue of writs of prohibition.[9]

[1] Reports of Cases in Chancery i App. 11, 12. Cp. Smith v. Crokew, Star Chamber Cases (C.S.) 38. [2] Ibid 14-25.

[3] Ibid 26, "We do will and command that our Chancellor or Keeper of the Great Seal for the time being, shall not hereafter desist to give unto our subjects, upon their several complaints now or hereafter to be made, such relief in equity (notwithstanding any proceedings at the common law against them) as shall stand with the merit and justice of their cause, and with the former, ancient and continued practice and presidency of our Chancery."

[4] Bacon's Works vii 581. In the earlier years of James's reign there was an agitation, favoured by the Common Law Courts, to exclude certain English counties from the jurisdiction of the Council of Wales. In 1610 the Chancellor stayed by injunction actions for false imprisonment and prohibition brought to try the right. Cp. ibid 685, 689.

[5] Morel v. Duglas, Hardr. 23. [6] Harris v. Colliton, Hardr. 120-125.

[7] King v. Standish, 1 Mod. 59. [8] King v. Welby, T. Raym. 227.

[9] An enquiry into the jurisdiction of the Court of Chancery in causes of equity.

From that time the jurisdiction of the court of Chancery to issue injunctions was not contested. Bacon's orders had laid down certain conditions as to their issue.[1] With the improvement in the procedure and practice of the Common Law Courts they came to be productive of much inconvenience. The court of Chancery liberally issued them with an eye, as Roger North hints, to the profits accruing.[2] Lord Cottenham in 1837[3] stated that, though necessary in some cases, they gave rise to as much injustice as they promoted justice.

(*c*) The modern development of the equitable jurisdiction. It was during the latter part of the 17th, and during the 18th, and beginning of the 19th centuries that the principles of the equitable jurisdiction became fixed. To this period we must look for the modern principles of equity. This was clearly pointed out by Jessel, M.R.[4] "It must not be forgotten, he said, that the rules of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time — altered, improved, and refined from time to time. In many cases we know the name of the Chancellor who invented them . . . Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence; and, therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases."

It would be impossible to describe even briefly the growth of all the various branches of the equitable jurisdiction. They were gradually created and elaborated, as they are at the present day being elaborated, by decided cases. If we look at White and Tudor's leading cases and the notes attached to them, we can see how a leading case lays down a general principle, and how that principle is modified or extended in its application to varied states of fact. It is in this way that the various incidents of the equity of redemption, together with the doctrines of tacking and

[1] Orders 20-28.
[2] Life of Lord North i 261 262.
[3] Brown v. Newell, 2 My. and Cr. at p. 570.
[4] In Re Hallett's estate (1879) L.R. 13 C.D. at p. 710.

consolidation have been elaborated. It is in this way that the greater part of the law of partnership, the law as to the administration of the estates of deceased persons, the law as to the separate estate of married women have grown up. Roughly we may classify as follows the various subjects with which equity deals:—[1]

(1) Jurisdiction connected with forms of property recognised in equity.

Under this head fall trusts and powers; the married woman's separate estate, the restraint on anticipation, and equity to a settlement; the mortgager's equity of redemption including the doctrines of tacking and consolidation; equitable mortgages; the vendor's lien; equitable waste.

(2) Jurisdiction over contract or wrongful acts.

Under this head fall specific performance and injunction.

(3) Relief against the rigidity of the law.

Under this head fall relief against penalties; fraud and undue influence; accident and mistake.

(4) Jurisdiction acquired by reason of the convenience of procedure of the court.

Under this head fall the administration of the estates of deceased persons, and subjects connected therewith, such as legacies, marshalling of assets, election and conversion; sureties; account; partnership; set off; discovery.

(5) Guardianship of infants.

The growth of the equitable jurisdiction was during this period influenced by two sets of causes.

(i) It was modified by external circumstances.

The abolition of the Court of Wards in 1660 gave to the court a more complete control over the guardianship of infants.[2]

It was modified by the changes incidental to all progress. "New discoveries and inventions in commerce," wrote Lord Hardwicke,[3] "have given birth to new species of contracts, and these have been followed by new contrivances to break and elude them, for which the ancient simplicity of the common law had adopted no remedies; and from this cause courts of Equity, which admit of a greater latitude, have, under the head adjuvandi vel supplendi juris civilis, been obliged to accommodate the wants of mankind. . . . Another source of the increase of business in Courts of Equity has

[1] See Kerly, Equity, 191-263.

[2] 12 Car. II. c. 24. It had before that time exercised some control in these cases from the time of Elizabeth, Spence i 611.

[3] Hardwicke's letter to Ld. Kames, cited Parkes, App. 501-510.

been the multiplication and extension of trusts. New methods of settling and encumbering landed property have been suggested by the necessities, extravagance, or real occasions of mankind. But what is more than this, new species of property have been introduced, particularly by the establishment of the public funds, and various transferable stocks, that required to be modified and settled to answer the exigencies of families, to which the rules and methods of conveying provided by the common law would not ply or bend."

The common law itself had lost much of its rigidity by the introduction, chiefly under the influence of Lord Mansfield, of various equitable principles.[1] As Blackstone has pointed out,[2] the Courts of Common Law had adopted principles of redress similar to those which had prevailed in courts of equity since the time of Lord Nottingham (1673-1682). Lord Mansfield may, it is true, have gone in some cases further in this direction than the law warranted.[3] But he gave to the common law a bias in favour of what Blackstone calls "liberality of sentiment," which made unnecessary much of that equitable interference with common law rules, which had in former days led to the conflict between the two jurisdictions.

(ii) It was only natural that under these circumstances the character of the equitable jurisdiction itself should undergo a change. The general nature of that change is clearly indicated by Mr Kerly.[4] "Equity, when Lord Eldon retired, was no longer a system corrective of the common law: it could be described only as that part of remedial justice which is administered in Chancery, while, taken generally, its work was administrative and protective, in contrast with that of the common law, which was remedial and retributive."

It is clear that in early days there were no fixed principles upon which the Chancellors exercised their equitable jurisdiction. The entire dependence of its principles upon the con-

[1] See Moses v. Macfarlan (1760), 2 Burr. 1005. In Eaton v. Jaques (1780), Dougl. 438, Ld. Mansfield recognised the existence of an equity of redemption —a decision promptly overruled by his successor Lord Kenyon.

[2] Comm. iv 435.

[3] Eaton v. Jaques (supra); Phillips v. Hunter (1795) 2 H. Bl. 402, 414; Marriot v. Hampton (1797) 7 T.R. 269; Atkins v. Hill (1775) Cowper 284; Hawkes v. Saunders (1782) ib. 289. "The Court of King's Bench," wrote Junius (Letter xli), "becomes a court of equity, and the judge instead of consulting strictly the law of the land, refers only to the wisdom of the court, and to the purity of his own conscience." There was just enough truth in this description to make it an effective caricature of Ld. Mansfield's work.

[4] Equity 167.

science of one man was a useful weapon to the common lawyers. "For some men think," wrote the serjeant,[1] "that if they tread upon two straws that lie across they offend in conscience, and some man thinketh that if he lack money, and another hath too much, that he may take part of his with conscience; and so divers men, divers conscience." Norburie,[2] writing soon after the fall of Bacon, said that, "the boundless power of the Chancery in not having rules and grounds written and prescribed unto it, in what cases it shall give relief and in what not, is the cause of much discontent and distraction to the King's subjects, and clamours against the Lord Chancellor." Selden's jest upon the variations of equity is well known.[3] Substantially the same view was taken by Whitelock in the time of the Commonwealth.[4] After the Restoration it is clear that the principles of equity were beginning to gain in fixity. When Vaughan, C.J., expressed his surprise that precedents should be cited in equity, Bridgeman, L.K., replied that they were both necessary and useful. "In them we may find the reasons of the equity to guide us; and besides the authority of those who made them is much to be regarded. . . . It would be very strange and very ill if we should distrust and set aside what has been the course for a long series of time and ages."[5] But Hale,[6] in discussing the question whether appeals from the Chancery should go to the House of Lords, could advance, as one of the reasons against the appellate jurisdiction, that equity cases were governed so much by circumstances that they were unfit to to be heard before a large tribunal. It was not, in fact, till quite the end of the 18th century that the principles of equity became a fixed body of doctrine. The conflicting statements which Blackstone permits himself with regard to them sufficiently illustrate this.[7]

[1] Harg., Law Tracts, 326.

[2] Ibid 430.

[3] "Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is chancellor, and as that is larger or narrower so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot." Cp. Spence i 423 for illustrative cases.

[4] "The proceedings in Chancery are secundum arbitrium boni viri, and this arbitrium differeth as much in several men as their countenances differ."

[5] Fry v. Porter (1670) 1 Mod. 300, 307.

[6] Jurisdiction of the House of Lords 201.

[7] Comm. i 61, 62. "Equity depending essentially upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law." iii 432 "the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection."

The causes for this vagueness in the principles of equity were twofold.

In the first place the court was new and its jurisdiction was not settled. The principles of equity were vague for the same reasons as the principles of the common law were vague in Henry II. and Edward I.'s reigns. This cause for their vagueness was removed mainly by the efforts of Lord Hardwicke (1737-1757) and Lord Eldon (1801-1806, 1807-1820).[1] Lord Hardwicke repudiated a power to legislate. He distinctly stated that general rules were absolutely necessary. At the same time he allowed that some discretion must be left to the judge; otherwise he might pronounce unjust decrees, and, "this might lay a foundation for an equitable relief even against decrees in equity, and create a kind of superfœtation of courts of equity."[2] The peculiar characteristics of Lord Eldon's mind, which led, as we have seen, to so many delays in the court, made him peculiarly fit to settle the principles of equity. He had a thorough grasp of existing rules and principles; but he looked as anxiously into all the facts and circumstances of the case as if there were no such rules, and as if, therefore, he was to determine each case for himself. It is not surprising to find that his decisions have defined the lines of the development of the court's jurisdiction for a century. "The doctrines of this court," he said, "ought to be as well settled, and made as uniform, *almost*, as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed by every succeeding judge. Nothing would inflict on me greater pain in quiting this place, than the recollection that I had done anything to justify the reproach, that the equity of this court varies like the Chancellor's foot."[3]

In the second place the application of equitable principles imply that the judge must be left with some discretion. To this extent equitable principles can never be so certain as common law rules. But this cause for the vagueness of equitable principles was much diminished in the 18th century by the settlement of the principles themselves. They guide the exercise of the judge's discretion. "Though proceedings in equity are said to be *secundum discretionem boni viri*, yet

[1] These two names are taken as illustrations. Many other Chancellors of the 18th century expressed and acted upon similar views, 3 P. Wms. 411, 412 (1735); 2 P. Wms. 259 (1724).

[2] Letter to Lord Kames, Parkes App. 501-510.

[3] Gee v. Pritchard (1818) 2 Swanst. 402, 414.

length given a direct control over Bankruptcy matters. The assignees were made officials of the Great Seal; and the Chancellor was, in certain cases, empowered upon the application of the creditor to remove them, or to suspend the commission.[1]

From the date of this act the Chancellor proceeded to enlarge his jurisdiction. Lord Hardwicke adjudicated upon almost every question which a jurisdiction in bankruptcy can involve.[2] The immense patronage and large fees which thereby accrued to the Chancellor, sufficiently explain the eagerness with which the jurisdiction was assumed, and the tenacity with which it was retained.[3] Though many questions arising in bankruptcy were capable of being tried, and often were sent by the Chancellor to be tried, by a court of law, it came to be thought that it would be impossible for any but the Chancellor to administer the jurisdiction.[4]

The result of burdening an overworked court with this mass of business is obvious. The evils were increased by the method in which the jurisdiction was exercised. The Parliamentary enquiries, made at the beginning of the 19th century, show that, in spite of many complaints, and a few statutes, the abuses of the 18th century still existed in an aggravated form.

Original jurisdiction was exercised by commissioners. Their appointment was in the absolute control of the Chancellor. But when appointed he had no direct control over them.[5] Their charges were high. They fared sumptuously at the expense of the estate. Till 1719 they did not act under the sanction of an oath.[6]

In London in 1828 there were 14 lists of commissioners.[7] Each list comprised five names. Commissions were issued in rotation to each list. Out of each list three could attend and take fees. The fees which they could take for each meeting were limited by statute.[8] But the statute was

[1] The duty of the assignees was to collect the property of the bankrupt, to pay dividends, and to account for their receipts and expenditure to the commissioners, Tarleton v. Hornby (1835) 1 Yo. and Coll. 172, 191.

[2] C. P. Cooper, Chancery, 250. The assumption of this jurisdiction in bankruptcy by the chancellor has added one doctrine to our system of equity, that of gaining priority by notice. See the history of this traced by Lord Macnaghten in Ward v. Duncombe L.R. 1893 A.C. 383-395.

[3] In 1826 the fees paid to the Lord Chancellor were £12,601, 6s. 4d. Lord Eldon at first doubted his moral right to touch these fees; but after consideration he overcame his scruples, Campbell, Chancellors, vii 675 n.

[4] Report of the Chancery Commission of 1816 35.

[5] C. P. Cooper, Chancery, 245, 260.

[6] Ibid 265-270.

[7] The lists were established about 1714, Ibid 261-265.

[8] 5 Geo. II. c. 30 § 42.

evaded by the practice of short meetings and successive adjournments under each commission.[1] It is said that a skilful commissioner could manage 30 meetings in one morning. The result of this state of things was almost inconceivable. "Each of the 14 lists was unconnected with and independent of the rest . . . one law and one practice prevailed in one list, and another in another . . . precedent had no binding force, and was very seldom listened to. As any three out of the five commissioners in each list might attend, the suitor was exposed, even in the same court, to a perpetual change of judge, and this not from one meeting to another, but even in the course of the same meeting. The three commissioners assembled under a number, sometimes a great number of different commissions at once. Their attention was solicited at one and the same moment by many suitors, all equally pressing, and entitled to dispatch upon their respective cases; and these often involving many nice questions of fact and considerations of law. One party gained the attention of a commissioner; he was instantly broken in upon by another party, perhaps by another commissioner; the half-heard case must be repeated, and the second judge soon in like manner gave way to a third."[2] For the country there were no permanent lists; but in the case of the country commissioners the state of affairs was as scandalous. Lord Eldon himself said of these commissions that they were regarded as stock in trade of the commissioners, the assignees, and the solicitor.[3]

It was calculated that a commissioner might make in fees about £300 a year. It is clear that such a sum could not secure a man competent to deal with a business so difficult as that of bankruptcy. In fact the commissioners were either young men who might be competent, but who were certainly inexperienced, or old men who were experienced, but incompetent.[4]

[1] C. P. Cooper, Chancery, 267, 268.

[2] Ibid 273, 274.

[3] Regulations in Bankruptcy (1801) 6 Ves. 1, 2, cited in Mr Montague's evidence before the Chancery Commission of 1816 at p. 398.

[4] The sum spent upon this absurd system of Bankruptcy jurisdiction was very large. The following are Cooper's figures given at p. 327:—

| | | | |
|---|---|---|---|
| Patentee | £16,176 | 11 | 5 |
| Lord Chancellor | 12,601 | 6 | 4 |
| London Commissioners | 28,000 | 0 | 0 |
| Country ,, | 28,000 | 0 | 0 |
| | £84,777 | 17 | 9 |

Only £74,000 were spent upon the twelve judges of the three Common Law Courts.

These shifting bodies had immense powers over the person and property of the bankrupt. Perhaps one of the worst abuses of the system was the irresponsible manner in which they exercised their power of committal. Mr Montague, in his evidence before the Chancery Commission, stated that he knew of a case in which one of his clients had been committed to Newgate after a two hours' examination. He was just married. His wife had property; and the object of the creditors of her father was to get part of his wife's property, by keeping him in prison while he was being examined. He was kept in prison for 21 days, and, but for the interposition of the Chancellor, he might have been there still. These facts were vouched by an uncontradicted affidavit in bankruptcy.[1]

We can easily see that, whether or not there was any historical ground for the Chancellor's wide jurisdiction in bankruptcy, its exercise was absolutely necessary. All important cases came before the Chancellor or (after 1813) the Vice-Chancellor.[2] The delay and expense of the hearing before the commissioners might just as well have been saved. The Chancery Commission had all these facts before them; and yet they gravely stated that the hearing before the Chancellor or Vice-Chancellor might be avoided if the parties "had proceeded with due circumspection and care before the commissioners."[3]

We have seen that, during the 19th century, the jurisdiction in bankruptcy has been entirely remodelled. In London it was finally handed over to the London Court of Bankruptcy. An appeal lay to the Chancellor, and, after 1852, to the Lords Justices in Chancery.[4] The country commissions were superseded by district bankruptcy courts,[5] the jurisdiction of which is now for the most part handed over to the new county courts.[6] Similarly modern statutes have reformed and consolidated the law itself.[7]

[1] Chancery Commission 406.

[2] Ibid at p. 36, "Matters in bankruptcy are heard by the Lord Chancellor and by the Vice-Chancellor upon petition; and the greater number of petitions in bankruptcy profess to be appeals from the decision of the Commissioners of Bankruptcy. But the parties, not being confined upon appeals to the same evidence which was adduced before the commissioners, the hearing before the Lord Chancellor and Vice-Chancellor has in practice become for the most part, not an appeal, but an original hearing."

[3] Lord Eldon was a party to this statement; yet he had once said (6 Ves. 1, 2), "Unless the court holds a strong hand over bankruptcy, especially as administered in this country, it is itself accessory to as great a nuisance as any known in the land, and known to pass under the forms of its law."

[4] Above 233. [5] 5, 6 Vict. c. 122 §§ 46, 52, 59. [6] Below, chap. ix.

[7] 46, 47 Vict. c. 52; 50, 51 Vict. c. 66; 53, 54 Vict. c. 71; Stephen's Commentaries (Ed. 1895) ii 148 seqq.

The jurisdiction in Lunacy.

It would appear that originally the lord was entitled to the wardship of the lands and person of those of unsound mind. The crown acquired this wardship, to the exclusion of the lord, probably by virtue of some statute or ordinance of the latter end of the reign of Henry III.[1] This prerogative of the crown is not mentioned by Bracton, but Fleta knows it;[2] and it is distinctly stated to exist in the so-called statute de Prærogativa regis.[3] The statute provides that the king shall have the custody of the lands of natural fools, taking the profits without waste, finding them in necessaries, and, after their death, restoring them to their right heirs (§ 9); "that the king shall provide, when any (that before time hath had his wit and memory) happen to fail of his wit;" their lands and tenements are to be kept without waste, and "they and their household shall live and be maintained completely with the profits of the same; and the residue . . . shall be kept to their use to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be claimed within the time aforesaid; and the king shall take nothing to his own use; and if the party die in such estate, then the residue shall be distributed for his soul by the advice of the Ordinary (§ 10)."

It appears from these two clauses that the law divided those of unsound mind into two classes—the idiot and the lunatic.[4] In the former case the right of guardianship was a profitable right analogous to the right of wardship. In the latter case it was in the nature of a duty. No profit could be made from it. This distinction is recognised by the cases.[5] Blackstone mentions the income of idiots' estates

[1] P. and M. i. 464; Staundford, Prerogative, 33, 34.

[2] I. 11. 10. Cp. Bracton 420 b and Britton ii 20.

[3] As to this document see article by Prof. Maitland, Engl. Hist. Rev. vi 367. It is one of a group of anomalous documents inserted in legal MSS. between the ending of the "Vetera Statuta" in the last year of Edward II.'s reign, and the beginning of the "Nova Statuta" in the first year of Edward III.'s reign. Throughout the Middle Ages it was accepted as a genuine statute. It may have been merely private work, or have emanated from some official on the instructions of the king. Its date is between 1255 and 1290.

[4] Bl. Comm. i 292, 294. "The idiot is one that hath had no understanding from his nativity"; the lunatic "is one who hath had understanding, but . . . hath lost the use of his reason." For the different terms applied by the older writers to express these conceptions, see Pope, Lunacy (ed. 1877) 10-15. Difficulties sometimes arose in the case of those whom the commission could not find of unsound mind, but who were obviously incapable of managing their own affairs, Sherwood v. Sanderson (1815) 19 Ves. 280; Ex parte Cranmer (1806) 12 Ves. 445. Cp. the definition of 16, 17 Vict. c. 70 § 2.

[5] Frances' case (1545) Moore 4; Prodgers v. Frazier (1684) 3 Mod. 43; Cor-

as a source of revenue; but the "clemency of the crown and the pity of juries" gradually assimilated the condition of idiots to that of lunatics.[1]

The statute mentions only the "lands and tenements" of the person of unsound mind. It was doubtful when Staundford wrote whether the prerogative extended to chattels real or goods.[2] It did not extend to copyholds in the 16th century.[3] It was gradually extended to all these classes of property when the guardianship began to partake of the nature of a duty rather than a right.[4]

Jurisdiction over those of unsound mind, being regarded in early times as a valuable right, was vested originally in the Exchequer.[5] As it came to be regarded in the light of a duty it passed to the Chancellor.

The Chancellor's jurisdiction rests upon two bases.

(1) It rests upon the share which he took in issuing the writs necessary to enquire into the alleged insanity. All proceedings connected with the issue of this writ, and the conduct of the enquiry under it, formed part of the common law jurisdiction of the court of Chancery; and an appeal lay to the House of Lords.[6]

(2) The more important part of his jurisdiction rests upon an express delegation by the crown to himself personally. This delegation might equally well have been made to any other great officer of state; and while the Court of Wards (1539-1660) was in existence the jurisdiction was exercised by it. The fact that the delegation was almost always[7] made to the Chancellor, is due, partly to his position as a great officer of state, responsible for the issue of the commission, partly to his position as the leading legal member of the Council. It was to the Council that a person of unsound mind so found by inquisition could originally appeal; and from the Chancellor it was to the Council and not to the House of Lords that appeals lay.[8]

By virtue of this express delegation the Chancellor appoints the committee for the lunatic, and is under the duty of seeing

poration of Burford v. Lenthall (1743) 2 Atk. 553; Lysaght v. Royse (1804) 2 Sch. and Lef. 153.

[1] Pope, Lunacy, 24.

[2] Prerogative 36.

[3] Dyer 302 b (1571); Beverley's case (1603) 4 Co. Rep. 126 b.

[4] Scriven, Copyholds (Ed. 1846) 52.

[5] Mem. Scacc. Trin. 19 Ed. I. (cited Pope, Lunacy, 25).

[6] F.N.B. 233; Bl. Comm. iii 427; Campbell, Chancellors, i 14, 15; Re Fitz-Gerald (1805) 2 Sch. and Lef. 436, 437.

[7] In Wigg v. Tiler (1779) 2 Dick 552, several instances are cited in which the warrant was addressed to the Lord High Treasurer. For the warrant see Campbell, Chancellors, i 15.

[8] 3 P. Wms. 108 n., citing a resolution of the House of Lords in 1726.

that the committee duly administers the lunatic's property. This jurisdiction has nothing whatever to do with the jurisdiction exercised by him as the judge of the court of Chancery. "Unsoundness of mind gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants whom it makes its wards. The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis*, whom it does not, and cannot make its ward. . . . It can no more take upon itself the management and disposition of a lunatic's property, than it can the management and disposition of the property of a person abroad, or confined to his bed by illness. The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself if of sound mind."[1]

It was through the control exercised by the Chancellor, as the delegate of the crown over the lunatic's committee, that the rules as to the management of the property of lunatics have grown up. The underlying principle of these rules is the interest of the lunatic. "Therefore the Chancellor is to administer the estate *tanquam bonus paterfamilias*, taking every advantage fairly to increase and improve it without engaging in risks and hazardous adventures. . . . Whatever tends towards ordinary improvement it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate."[2]

Modern statutes have remodelled the jurisdiction in lunacy. The most important is 15, 16 Vict. c. 70. Under that act the jurisdiction is exercised by the Chancellor and the Lords Justices in Chancery assisted by masters and visitors.[3]

[1] James, L.J., Beall v. Smith (1873) L.R. 9 Ch. Ap. 85, 92.
[2] Oxenden v. Ld. Compton (1793) 2 Ves. 73.
[3] See now the Lunacy Act of 1890.

## CHAPTER VI

## THE COUNCIL

THE Council, as a judicial body, may be in a sense regarded as the parent stem from which the other courts of law and equity have sprung. Its history falls into three well-defined periods. (1) The mediæval period. (2) The Tudor and early Stuart period. (3) The later history of the Council.

(1) The mediæval period.

In describing the growth of the court of Chancery we have necessarily dealt with the various kinds of jurisdiction exercised by the Council in the Middle Ages. It was not, as we have seen, till after this period that the Chancery and the Council begin to be clearly separate. Its jurisdiction was wide and vague. Cases which especially concerned the king's interest, cases which dealt with matters outside the common law, such as alien merchants, maritime, or ecclesiastical law, cases in which the Common Law Courts had not the power to act efficiently, cases in which the law itself was at fault—all came before the Council.[1] The Council sometimes dealt with these matters itself, sometimes it sent them to be disposed of by the ordinary courts, sometimes a special commission of oyer and terminer was issued, sometimes it directed the Chancellor to deal with them. We must consider here (i) the constitution of the Council; (ii) the relations between the Council and Parliament.

(i) The constitution of the Council.

We have seen that at the end of the 13th and the beginning of the 14th century Parliament gradually becomes separate from the Council.[2] At the end of the 14th century and the beginning of the 15th century we find that a division is taking place within the Council itself. The Privy or Ordinary Council, which consists of the great officers of state, and certain other trusted advisers of the king, is becoming distinct from the Great Council, which consists of the Privy Council and the general body of the nobility,

[1] Above 200-202. [2] Above 174, 175.

spiritual and temporal. The process can be the more readily traced as we possess the Council records from 1386. The records first speak of the Council simply. But about the time of Henry VI. we meet with the term Privy Council.[1] Before this time there existed a body of paid and sworn councillors: the new term illustrates the fact that this body has became a well recognised and distinct department of state.

The Privy Council usually consisted of the five great officers of state—the Chancellor, the Lord Treasurer, the Keeper of the Privy Seal, the Chamberlain, and the Steward of the Household—the archbishops of Canterbury and York, and from ten to fifteen other members.[2] Besides these regular members of the Council, others distinguished for their knowledge of the law, or other special branches of knowledge, were occasionally summoned.[3] It was only those who had taken a special oath who were the regular members of the Council. These regular members received salaries proportioned to their rank; and they were fined if they did not regularly attend.[4] Their position, as contrasted with that of the members occasionally summoned, is illustrated by an ordinance of 1426.[5] That ordinance alludes to the fact that matters discussed in the Council had been published, and provides that "no person, of what condition or degree that he be, be suffered to abide in the Council, while matters of the said Council be treated therein, save only those that be sworn unto the said Council, but if they be specially called thereto by authority of the said Council."

It was through the Council that the royal authority was exercised. Both its constituent members and the extent of its independent authority depended largely on the character of the king. Throughout the Lancastrian period its authority tended to increase. The doubtful title of Henry IV., the absences of Henry V., the minority and incapacity of Henry VI. tended to give to the Council an authority controlled mainly by Parliament.[6] The result was disastrous. Parliament was controlled by the leading nobility. The nobility, therefore, got control of the Council and the government. "Under the vigorous administration of Henry IV. many commoners are called to the council-board; under the feeble rule of his

[1] Dicey, The Privy Council, 43, 44.
[2] Nicolas i *ii*, *iii*.
[3] Dicey 44.
[4] Nicolas iii *xx* and 156.
[5] Ibid 215. For other ordinances regulating the Council's procedure, see ibid i 18 a; iii 149-152; R.P. iv 201 (2 Hy. VI. n. 17).
[6] Below 269, 270.

grandson, when factions of the nobility had usurped nearly the whole government, the constantly recurring lists of councillors contain few untitled names."[1] They ran the government simply in their own interests. Fortescue[2] tells us that they had business of their own to be treated of in the Council, as well as the business of the king. "Wherethrough when they come together, they were so occupied with their own matters, and with the matters of their kin, servants, and tenants, that they attended but little . . . to the king's matters. And also there were but few matters of the king's, but the same matters touched also the said counsellors, their cousins, their servants, tenants, or such other as they owed favour unto. And what lower man was there sitting in that council, that durst say against the opinion of any of the great lords? And why might not these men make by means of corruption some of the servants and councillors of some of the lords to move the lords to partiality, and to make them also favourable and partial as were the same servants or the parties that so moved them? Then could no matter treated in the council be kept privy. For the lords often times told their own councillors and servants, that had sued to them for those matters, how they had sped in them and who was against them." Fortescue recommends a Council of twelve spiritual and twelve temporal men "of the wisest and best disposed that can be found in all parts of this land." They are to take an oath like that of the judges. They are to have a president to be chosen by the king. They are to meet at certain hours and deliberate upon all matters of state and suggest legislative changes to Parliament.[3] The Chancellor, Treasurer and Privy Seal should be ex officio members; and the judges should be summoned as occasion demands. The Council should keep a book of rules for its own procedure.

These criticisms and suggestions of Fortescue show how urgent was the need for some reform of the Council at the end of the mediæval period.

(ii) The relations between the Council and Parliament.

Parliament viewed the vague and indefinite jurisdiction of the Council with much suspicion. This arose chiefly from two causes. (1) The Council, as an executive body, was identified with the crown and the prerogative. It was the

[1] Dicey 27. [2] Governance of England, chap. xv.

[3] "Wherethrough the parliaments shall do more good in a month to the mending of the law, than they shall now do in a year, if the amending thereof be not debated, and by such council riped to their hands."

actions of the crown and the prerogative which Parliament criticised and controlled. (2) It was regarded as exercising a rival jurisdiction outside the common law. It acted by a procedure and upon principles other than the known principles of the common law. It was often more efficient than the common law. It was certainly more powerful than the Common Law Courts. The laymen feared and suspected it. The lawyer hated it because it encroached upon his province. We have seen that in Edward III.'s reign the judges denied that their decisions could be questioned in the Council.[1] They would have liked to confine its jurisdiction to matters falling outside the common law, such as aliens, maritime and ecclesiastical cases.

Both these causes of distrust united against the claim of the Council to deal with a class of criminal cases, which would clearly have fallen within the jurisdiction of the Common Law Courts, if they had been strong enough to deal with them. That there were many such cases all through this period is clear. That a tribunal which could deal with them effectually was needed is equally clear. Unfortunately it often happened that the great powers of the Council were used, not so much with the object of impartially enforcing the law, as with the object of perverting its provisions out of favour to powerful individuals. It is for this reason that the general feeling against the exercise of arbitrary power, and the professional feeling of the common lawyers united against the Council. These feelings are abundantly illustrated by statutes and petitions.

Among the statutes which were thought to guard the supremacy of the common law the lawyers of the 14th century placed first the clause of Magna Carta which ordained that no man shall be condemned save by the lawful judgment of his peers or by the law of the land. The old meaning of the phrase had disappeared with the victory of royal justice.[2] As newly interpreted it starts upon a new and more famous career. In 1328[3] it was enacted "that it shall not be commended by the great seal nor the little seal to disturb or delay common right; and though such commandements do come, the justices shall not therefore leave to do right in any point." In 1331[4] there is an enactment against proceedings contrary to "the form of the Great Charter and the law of the land." In 1350[5] it was enacted that "none shall be

[1] Above 174 n. 5. [2] Above 36.
[3] 2 Ed. III. c. 8; cp. 14 Ed. III. St. 1 c. 14, and 11 Rich. II. c. 10.
[4] 5 Ed. III. c. 9. [5] 25 Ed. III. St. 5 c. 4.

taken by petition or suggestion made to our Lord the King or to his Council unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done in due manner or by process made by writ original at the common law; nor that none be out of his franchises nor of his freeholds, unless he be duly brought in to answer and forejudged of the same by the course of the law." In 1354 and 1368 statutes were passed to the same effect.[1]

The result of these statutes is simply to state that matters, which fell within the jurisdiction of the Common Law Courts, shall be dealt with by the Common Law Courts and by their procedure. They do not directly restrict the jurisdiction of the Council. We can see from the petitions to Parliament, and from the answers returned to them, that its jurisdiction remained as elastic as ever.

In 1314[2] there is a complaint that commissions of oyer and terminer are too lightly granted to favoured individuals contrary to the common law. The reply is that they shall for the future be granted to impartial judges and only for "enormous trespasses." In 1351[3] there is a petition that no man be put to answer for his free tenement, nor for anything that touches life or member before the King's Council except by process of law before used. The reply is, "Il plest a notre Seigneur le Roi que les Leies de son Roialme soient tenuz et gardez en lour force, et que nul homme soit tenu a respondre de son fraunk tenement, sinoun par processe de Ley; Mes de chose que touche vie ou membre contemptuz ou excesse, soit fait come ad este use cea en arere." In 1378[4] there is a long reply to a petition of a similar character, to the effect that it is not reasonable to restrain the king from sending for those of his subjects whom he requires. He promises, however, that they shall not be required to answer for their freehold; but if the King or his Council be credibly

[1] 28 Ed. III. c. 3; 42 Ed. III. c. 3. The latter statute recites that people are accused before the Council "more for revenge and singular benefit, than for the profit of the king or of his people."

[2] R.P. i 290 (8 Ed. II. n. 8). Cp. a similar petition R.P. iii 161 (7 Rich. II. n. 43) that such commissions shall not be granted unless by good deliberation of the Council; this is granted, but with a saving of the king's prerogative.

[3] R.P. ii 228 (25 Ed. III. n. 16). Cp. R.P. iii 21 (1 Rich. II. n. 87). The king grants that petitions be not terminated before lords or officers of the Council, "s'il ne soit tiele querele et encontre si graunde persone que homme ne suppose aillours d'avoir droit."

[4] R.P. iii 44 (2 Rich. II. n. 49); cp. R.P. iii 506, 507 (4 Hy. IV. n. 78), a petition of a similar nature reciting Edward III.'s statutes. A similar answer is returned.

informed that for maintenance and oppression the common law cannot be enforced, in that case the persons accused can be lawfully summoned. In 1389[1] there is a petition against the practice of sending for persons by writs of quibusdam de certis causis and subpœna. The answer is, "Le Roy voet sauver sa Regalie, come ses progenitours ont faitz devant luy." In 1399[2] there is a complaint that personal actions are removed before the Council by letters of Privy Seal and are there tried before enemies of the plaintiff or defendant; the prayer of the petition is that such actions be not tried before the Council. The petition is granted, unless one party is rich and the other poor, so that justice cannot otherwise be done. It is clear that the jurisdiction of the Council is extremely ill-defined. Parliament has not succeeded in substantially limiting it.

During the latter half of the 15th century the powers of Parliament increased. It constantly interferes in all departments of government. It exercises control over the appointment and conduct of the king's ministers. In fact during the latter part of Henry VI.'s reign the king's ministers seem almost more dependent on Parliament than upon the crown.[3] It is this phenomenon which has led some historians to compare this period with the modern relations between Parliament and the ministers of the crown, and to talk of the "constitutional experiment."

The result of the increased control over the Council obtained by Parliament was not so much the limitation as the recognition of its jurisdiction.[4] Petitions addressed to Parliament were sent to the Council to be answered.[5] So usual a proceeding was this, that in 1420 we find a petition directed against those who endorse bills to the Council with the words "by the authority of Parliament," without having such authority.[6] Statutes strengthened and recognised its authority. In 1411[7] it was given a jurisdiction in cases of riot. In 1452[8] penalties were enacted against those who

[1] R.P. iii 267 (13 Rich. II. n. 33); cp. R.P. iii 323 (17 Rich. II. n. 52); ibid 471 (2 Hy. IV. n. 69); ibid iv 84 (3 Hy. V. n. 46); ibid 156 (9 Hy. V. n. 25).

[2] R.P. iii 446 (1 Hy. IV. n. 162).

[3] Nicolas i *lxii*, *lxiii* and 297; vi *lii-liv*.

[4] See the case of John Roger (1428) (Nicolas iii 313). He had shipped wool contrary to the statute. The Council consulted the judges whether they should fine him or send him to be tried by a jury. The judges say fine him, as he might corrupt the jury. He was fined 200 marks or more if he can pay. Cp. Palgrave, Council, 70.

[5] R.P. iv 99, 100 (4 Hy. V. n. 15); ibid 321, 322 (6 Hy. VI. n. 17).

[6] R.P. iv 127 (8 Hy. V. n. 23).

[7] 13 Henry IV. c. 7 § 2.

[8] 31 Henry VI. c. 2; Reeves, H.E.L. ii 535, 536.

did not appear before the King's Council when warned to do so.

In fact the aims of Parliament, or rather of the "over mighty subjects" who dominated it, were rather personal than constitutional. Feudalism of the older type had been crushed in the 13th century. But men's political ideas were cast in a feudal mould.[1] The victory of the Parliament meant, not the victory of law, but the victory of the great noble. He gained the power to use the Council, and all the other organs of government for his personal ends—to divert the state organization to feudal uses.[2] The failure of Parliamentary government was demonstrated by the Wars of the Roses. In consequence the jurisdiction of the Council comes to be regarded as not only not illegal, but as the one source from which some sort of decent government may be expected. "It is easy to understand," says Prof. Dicey, "that in a state of society where noble lords opposed the Justices, and 'maintained and cherished' robbers, pillagers, and ravishers of women, the people turned with hope to the King and his Council, who professed at least to prefer the cause of the poor, and by means, arbitrary it might be, but yet efficacious, gave justice in those numerous cases where there was 'too great might on the one side, and too great unmight on the other.'"[3]

Fortescue was not a judge to exalt the power of the king at the expense of Parliament. His views upon the powers of Parliament were cited with effect by the Parliamentary lawyers and statesmen of the 17th century.[4] An able well-paid Council is as we have seen the remedy which he proposes for the weakness of the government.[5] He does not hint that the statutes of Edward III.'s reign had in any way controlled its jurisdiction.

We shall see that in the following period his views were carried out with success by the Tudors. It is not until the mediæval contests between the Council and Parliament have been worked up by lawyers of the 17th century into legal precedents, that we begin to hear of any substantial limitation of the Council's powers.

[1] "A parliament of Richard II. threatens to dissolve itself, but no mediæval parliament threatens to sit in permanence." (Stubbs, C.H. iii 520.) We have in this sentence the whole contrast between the mediæval and the 17th century ideas upon politics. [2] Fortescue, The Governance of England, chap. xv.

[3] Dicey, The Privy Council, 75. For illustrations see Nicolas iii *xliv*; iv 300, 301; v *xxvii*, *xc*, *cxx-cxxvii*, 35, 39, 57-59; vi 154, 159, 161, 162, 189, 190, 267-269 272, 273.

[4] Fortescue, De Laudibus, chaps. 9 and 13. The case of Ship Money (1637) 3 S.T. at p 1136 (Crooke, J.). [5] Governance of England chaps. xv, xvi.

(2) The Tudor and early Stuart period.

We shall deal with this period under two heads—(i) The organization of the Council; (ii) the constitutional conflict.

(i) The organization of the Council.

Parliamentary government had proved a failure. It was by means of the Council that the Tudors re-established a strong government. This necessarily involved an entire reorganization of the Council,[1] and a great extension of its powers. Their system of government was, as Mr Prothero[2] says, "admirably calculated to be the support of order against anarchy, or of despotism against individual and national liberty." He points out that during the Tudor period it appeared in the former light, under the Stuarts in the latter. The subject will fall under two heads—(*a*) The Council, the Star Chamber, and subordinate branches of the Council; (*b*) The jurisdiction of the Council and the Star Chamber.

(*a*) The Council, the Star Chamber, and subordinate branches of the Council.

In 1487[3] an act was passed which, among other things, dealt with the authority of the Council. This act is, perhaps, more important from the point of view of later controversies as to the Council's jurisdiction, than from the point of view of the actual results effected by it.[4] The act recites that by unlawful maintenances, by giving of liveries and "retainders by indentures,"[5] by untrue demeanings of sheriffs in making of panels and other false returns, by bribery of jurors, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued. It is therefore enacted "that the Chancellor and Treasurer of England for the time being, and Keeper of the king's Privy Seal, or two of them, calling to them a bishop and a temporal lord of the king's most honourable Council, and the two Chief Justices of the King's Bench and Common Pleas, for the time being, or other two Justices in their absence, upon bill or information put to the said Chancellor for the king, or any other, against any person for any misbehaviour before rehearsed, have authority to call before them by writ or by Privy Seal the said misdoers, and them

[1] It consisted largely of new men promoted for their administrative capacity. In 1536 the Northern rebels complained of the "humble birth" of the Privy Councillors, Nicholas vii *iii*, *iv*.

[2] Encyclopædia Britannica (9th Ed.), Art. Star Chamber.

[3] 3 Henry VII. c. 1. [4] L.Q.R. xviii 253, 254.

[5] I.e. contracting to supply small bodies of soldiers. For a specimen of one of these contracts see Oman, Warwick, 36, 37.

and other by their discretion, by whom the truth may be known, to examine, and such as they find therein defective, to punish them after their demerits, after the form and effect of statutes thereof made, in like manner and form as they should and ought to be punished, as if they were thereof convict after the due order of the law."[1] The effect of this act seems to have been to constitute a committee of the Council to deal with certain offences which were particularly common.[2] According to the opinion of both Coke and Bacon, it did not limit the wide jurisdiction of the Council.[3] It simply confirmed that jurisdiction in certain points by Act of Parliament, and vested it in a committee. We shall see that another view of this statute was put forward by the common lawyers who disliked the jurisdiction of the Council. But we shall see that this view was decisively condemned by the best legal opinion of the day.[4]

No doubt some confusion was caused to the lawyers in later times by the title of the Act, "Pro Camera Stellata." When, at the end of the 16th century, the jurisdiction of the Council had come to be exercised mainly in the Star Chamber, it might seem as if the court of Star Chamber was a separate court depending for its efficacy on the act of 1487. The name and use of the term Star Chamber, and the history of the separation, never quite complete, of the court of Star Chamber from the Council will show the fallacy of this view.

The name has been variously and fancifully[5] derived. Blackstone derives it from the word "Starra"—the term used for the contracts and obligations of the Jews. These were deposited in certain places the chief of which was exchequer at Westminster.[6] The room so used came to be appropriated to the Council; and hence the Council took the name, Star Chamber. Coke,[7] Sir Thomas Smith,[8] and Camden[9] derived the name from the fact that the roof of the room, where the Council sometimes sat, was ornamented with stars. Additional probability is lent to this theory by the fact that the "Sterred Chambre" is

[1] 21 Henry VIII. c. 20 added the President of the Council as a judge.

[2] Stephen, H.C.L. i 174, 175. Cp. Hallam, C.H. i 55 n. He thinks that the Star Chamber could not base any claims on this act, as the court established by the act was not the Star Chamber; and that the Star Chamber was therefore illegal. But if the Star Chamber is the Council (as he admits), and if this act, as Bacon said (History of Henry VII., Works vi 85), merely confirmed its jurisdiction in certain cases, Hallam's deduction would appear to be erroneous. Cp. Prothero, Documents, ciii, civ.

[3] Below 289.

[4] Below 288, 289.

[5] Hudson 8.

[6] Comm. iv 263 n; above 31.

[7] 4th Instit. 66.

[8] Commonwealth, Bk. III. c. 4.

[9] Britannia (Ed. 1607) 130.

first referred to in 1348. Only the year before Edward III. had made extensive additions to the palace of Westminster, which comprised among other things a new council chamber.[1] On either view the name is the name of a place where the Council sometimes sat.

The act of 1487 constituting a committee of the Council for the exercise of certain kinds of jurisdiction does not stand alone. We have seen that in Henry VI.'s reign acts were passed conferring jurisdiction on the Council. A similar committee was constituted in 1494 to deal with perjury and certain other offences.[2] But these acts did not extinguish the vague and indefinite jurisdiction exercised by the whole Council. The Council sitting either in the Star Chamber or elsewhere still continued to exercise a jurisdiction over a wide variety of different cases. The Council which exercises this jurisdiction is in no way different from the Council of state which constitutes the executive. The only distinction which can be drawn is the presence of the chief justices when the Council is sitting as a judicial body.[3] In the earlier part of the 16th century even this distinction is not invariably observed.[4] In fact the constitution of the Council was very flexible because it was very dependent on the king's will. Much of the varied business of state which came before it was necessarily transacted by committees; and these committees would naturally vary with the needs of the time.[5]

There are however indications, which grow more distinct as we approach the end of the 16th century, that a committee of practically the whole Council sitting in the Star Chamber is gradually absorbing the judicial work. But the process is gradual, and we have few definite data. The relation of this committee of the whole Council sitting in the Star Chamber to the Council itself (whether sitting or not in the Star Chamber), and its relation to the statutory committees of Henry VII.'s reign, are obscure to us probably because they were not precisely defined in the 16th century. It is clear that the

[1] Baildon, Les Reportes in Camera Stellata, xlii-xlv. As he points out, the word "starra" could hardly become "sterred" or "stellata."

[2] 11 Henry VII. c. 25; 12 Henry VII. c. 2.

[3] Star Chamber Cases (C.S.); Coke, 4th Instit. 65; L.Q.R. xviii 254. The rule as to who were members was not perhaps quite clear. Coke implies that the king could summon any Lord of Parliament, though, as such, they were not standing judges. This is borne out by Dudley's case (1604) Les Reportes, etc., 171; Camden, Britannia, 130 (Ed. 1607); Hudson 24, 25, 36.

[4] Nicolas vii 83; Dasent ii 385.

[5] Burnet, History of the Reformation (Ed. Pocock) v 117, gives us the different committees of the Council in Edward VI.'s reign. Cp. Dasent iv 397-399.

Star Chamber was the place where much of the jurisdiction of the Council and its committees were exercised. This may have determined the place where the committee of the whole Council sat, when its judicial began to be separated from its administrative work. A body performing judicial functions in a determinate place will soon become a distinct court.[1] It is natural that this body, consisting of the chief justices and the whole body of the Council, should absorb the smaller statutory committees of the 15th century.

The evidence that this separation was taking place is derived chiefly from two sources—(1) the acts and proceedings of the Privy Council itself; (2) Contemporary writers upon the court of Star Chamber.

(1) The acts and proceedings of the Privy Council contain indications that the Council sitting in the Star Chamber for the purpose of judicial work is becoming a distinct court. In 1564 a person is ordered to appear every day the Lords sit in the Star Chamber.[2] In 1578 a person is ordered to appear the first day of the next Star Chamber.[3] Mr Dasent notes[4] in 1580-81 that entries on the Council records relating to business in the Star Chamber are written on different sized paper, and are interleaved in the MS. It is fairly certain that the Star Chamber sat only in term time,[5] and that matters which came before the Star Chamber did not necessarily come before the Council. Certainly as early as 1570 the Council declined to accept a plea that the matter is coming before the Star Chamber, though in the end the plaintiff is directed to prosecute his suit there.[6] In fact from 1582 onwards we can see that the Council is desirous of getting rid of the mass of private litigation which was brought before it. In the April of that year there is the following entry[7]:—"The Lordes and others of her Majesties Privie Councell considering what multitude of matters concerning private causes and actions betwene partie and partie were daylie brought unto the Councell Bourde, wherewith their Lordships were greatlie troubled and her Majesties speciall services oftentymes interrupted, for remedye whereof it was agreed among them

[1] "*The Lords sitting in the Sterre Chamber* became a phrase; and when we consider the influence of names in human affairs, and how comparatively weak any body of men remain until they have found an incorporate appellation . . . we can hardly doubt but that this circumstance contributed to assist the Council in maintaining their authority," Palgrave, Council, 38, 39.

[2] Dasent vii 189. [3] Ibid x 383, cp. xii 277. [4] Ibid xii *vii*, xiii *vii*.

[5] Coke, 4th Instit. 65.

[6] Carter, Legal History, 113-115, citing Dasent vii 405; viii 12.

[7] Dasent xiii 394, 395.

that from henceforthe no private causes arrising betwene parties for any action whatsoever which maye receyve order and redresse in any of her Majesties ordinary Courtes shal be receaved and preferred to the Bourde, onless they shall concerne the preservacion of her Majesties peace or shalbe of some publicke consequence to touche the government of the Realme." This resolution does not seem to have been followed by much result. It was repeated in 1589;[1] and in the same year there occurs an entry which shows that the court of Star Chamber is regarded almost as an ordinary court distinct from the Council. The entry is dated Oct. 22nd[2] and runs as follows:—"Whereas in a cause depending betwene Johne Love of Ellawe in the county of Suffolk, yeoman, plaintiff, and Thomas Love and Cyprian Hullocke, defendants, the parties being called before their Lordships yt appeared unto them that the said cause was depending in the Starre Chamber, where the same is to receave tryall, and in that case by their Lordships late order not to be determined at the Counsell Borde; the parties, therefore, together with the said cause, were this daye dismissed and left to their triall *in the Starre Chamber, or in suche other court of Justice or Conscience* where the same is properly to be determined." The Council does not however abandon all its jurisdiction. In fact an order similar to that of 1589 is made in 1591.[3] It is clear however that the Council sitting in the Star Chamber is coming to be regarded as a separate court, and that this court is taking much of the judicial work which formerly came before the Council.

(2) The evidence of contemporary writers upon the court of Star Chamber points in the same direction. Camden,[4] Sir Thomas Smith,[5] Lambarde,[6] and Crompton[7] regard the Star Chamber as a separate court, but as a court which has a close connection with the Council. We may gather the same thing from Coke and Bacon; and their evidence is entitled to great weight because they were both distinguished members of the court. Coke in his Fourth

[1] Dasent xviii 181-183. It is recorded that their Lordships had promised that they will not for private favour evade the order; and they reserve to themselves the right to hear any cases in which a denial of justice in the ordinary courts is alleged, or any cases where there is an information for treason or conspiracy.

[2] Ibid 195. [3] Ibid xxi 240.

[4] Britannia 130 (Ed. 1607) cited Prothero 175.

[5] Commonwealth, Bk. III. c. 4.

[6] Archeion 116-218 (Ed. 1635) cited Prothero 181, 182.

[7] Courts 29 "Le Court de Starre Chambre est Hault Court, tenus auant le Roy et son Counsell et auters."

Institute treats of the Council and the court of Star Chamber in separate chapters.[1] Bacon treats it as a separate court which exercises "the high and pre-eminent power" reserved to the king's Council "in causes that might in example or consequence concern the state of the commonwealth."[2] The best evidence, however, of the nature of the process which was separating the court of Star Chamber from the Council is Hudson's treatise on the Star Chamber.[3] We can see from that work that the court, its staff, its forms and its procedure are being gradually shaped by the cases decided there, and by the eminent men who sat as judges. We see a process at work similar in its nature to the process which in earlier days distinctly separated the Courts of Common Law from the Curia Regis.

The court has the official title and style of "The Lords of the Council sitting in the Star Chamber." Persons are cited to appear "coram Domino Rege in Camera Stellata coram Consilio ibidem."[4] But it is clear from Hudson that the practice was not yet perfectly fixed.[5] The style of the court, however, illustrates its connexion with the Council; and it is clear that the actual presence of the king is not yet entirely a fiction.[6]

The court has also its proper officials—a clerk of the court, examiners, an usher, attornies of the court and a serjeant.[7] As the business of the court increased the officials tended to increase in number, and the fees to grow in amount. Hudson notes as new officers, a clerk to make warrant for processes, to record appearances, and to deliver certificates; another to keep the record of bills, pleadings, examinations and commissions; another to enter affidavits and orders; a registrar to draw decrees.[8] He says that formerly there were only two attorneys to the court who acted for the parties, but that their number had risen to four.[9] As in the court of Chancery, these officials were paid by fees and copy money, with the usual result that the process became costly and lengthy.

[1] Caps. 2 and 5. [2] History of Henry VII.
[3] Printed in the 2nd vol. of Collectanea Juridica.
[4] Baildon, Les Reportes, etc., lii, lv; Coke, 4th Instit. 65. [5] 24, 25.
[6] A seat was always reserved for the sovereign before which the purse and mace were laid, Manningham's diary (C.S.) 53.
[7] Hudson 37-48. He notes at p. 29 that, "the causes of equity in Chancery growing many, and other employments of special service pressing the principal officers, the clerk of the court hath of latter times been trusted with the direction of things of course." The serjeant "made great profit by preparing convenient places for young noblemen and men of quality, which flock thither in great abundance, when causes of weight are there heard and determined," at p. 48.
[8] 40, 41. [9] 45.

Thus we read that the power of examining the parties "was used like a Spanish inquisition to rack men's consciences, nay to perplex them by intricate questions, thereby to make contrarieties which may easily happen to simple men; and men were examined upon 100 interrogatories, nay, and examined of the whole course of their lives."[1] When the interrogatories in one case could only be contained on a parchment roll four yards long, we are not surprised that a rule was made confining them to sixteen sheets with fifteen lines on a sheet.[2] The question of costs, and the question what privileges officials and suitors of the court possessed are discussed by Hudson.[3] It is clear also that the procedure in use in the court is becoming fixed. In civil cases the plaintiff filed a bill and the procedure thereon was similar to that of the court of Chancery.[4] In criminal cases there was either a written information by the Attorney-General as in the court of King's Bench,[5] or a complaint by the Attorney-General *ore tenus*.[6] The ordinary rules of procedure were enforced upon all parties, even, as Hudson specially notes, upon the Attorney-General.[7] He has much to say upon the form of the bill, upon answers, examinations, interrogatories, pleas, and demurrers. It is clear, therefore, that the Star Chamber is becoming a settled court. It is probable from Hudson's account that this result was largely due to Lord Ellesmere's reforms in its practice and procedure.[8] He was doing for the court of Star Chamber what he was doing for the court of Chancery.

We may conclude, therefore, that the court of Star Chamber was fast becoming a court separate from the Council. It is probable, however, that the intimacy of the relations between the Council, and a court, the judges of which comprised all the privy councillors, retarded in some degree the process. The Council still retained some judicial business. In the volume of Star Chamber Reports (1593-1609) much miscellaneous business is recorded.[9] We can see from the Orders of 1627 that the Council still hears the causes of private

[1] Hudson 169. [2] Baildon, Les Reportes, etc., 10, 11; Hudson 151. [3] 46, 135, 142-168. [4] 150-157, 161-168. [5] Coke, 4th Instit. 63.

[6] Hudson 126-128. Coke notes that this procedure is rare. It must proceed "upon the confession of the party in writing under his hand, which he again must freely confess in open court, upon which confession in open court, the court doth proceed. But if his confession be set down too short, or otherwise than he meant, he may deny it, and then they cannot proceed against him but by Bill or Information, which is the fairest way." [7] 137. [8] 27, 238, 239.

[9] Les Reportes, etc., at pp. 19, 56, 101, 186, 326, 367 we get proclamations of Orders in Council, and the Lord Chancellor's annual charge to the justices of assize and the justices of the peace.

individuals.[1] It was perhaps impossible to draw the line strictly between judicial and administrative work. We shall see that at the present day the Judicial Committee sometimes performs functions which are not strictly judicial.[2] In 1640 the act which abolished the court is entitled "an act for the regulating of the Privy Council and for taking away the court commonly called the Star Chamber." This title probably indicates with substantial accuracy the relations between the two bodies.

The increase of business, which tended to separate the judicial and the administrative sides of the Council, gave rise to a number of subordinate Councils in other parts of the country. The most important of these were the Council of the North, the Council of Wales and the Marches, and the Council of the West.

The Council of the North was set up by the prerogative in 1539. But it had been recognised in acts of Henry VIII.'s and Elizabeth's reigns.[3] The Council of Wales had a similar origin; but it had been confirmed by Parliament in 1542.[4] The Council of the West had been set up by statute in 1540;[5] but Coke tells us that owing to local opposition it had ceased to exist.[6] The disturbed state of the borders of Wales and Scotland was the cause and the justification for the two first-named branches of the Council.

The jurisdiction of these Councils was substantially similar to that of the Star Chamber. In addition the Council of Wales had power to determine personal actions, when the debt or damage claimed did not exceed £50, and a full equitable jurisdiction, except only the power of issuing injunctions to the Courts of Common Law.[7] Their relation to the Council and the Star Chamber was that of assistants and subordinates.[8] The fact that a case was within their jurisdiction did not impede that of the court of Star Chamber.[9] The Council of the North were directed to refer cases of importance to the Privy Council.[10] It is clear from the instructions issued to these Councils that their organization and procedure were modelled on that of the Council.

(*b*) The jurisdiction of the Council and the Star Chamber.

[1] Cited in App. to Selborne, Judicial Procedure in the Privy Council. See especially Orders 3 and 9. Wednesday and Friday afternoons are set apart "for despatch of suitors, if the greater occasions of state do not hinder."

[2] Below 298, 299.

[3] 32 Henry VIII. c. 50; 13 Eliza. c. 13.

[4] 34 Hy. VIII. c. 26, § 4.

[5] 32 Hy. VIII. c. 50.

[6] 4th Instit. 246.

[7] Instructions for the Council (1617) xvii, xxi (Prothero, Documents, 384, 385).

[8] Dasent v 299; vi 101; viii 204, 207, 231; x 116, 117, 206; xiii 131, 246; xvii 141, 177, 309, 336; xix 57.

[9] Hudson 117.

[10] (1603) xxix, Prothero 371.

The jurisdiction of the Council, civil and criminal, continued to be almost as wide as it was in the Middle Ages. The limitations upon its power were as yet somewhat indefinite. The growth of the court of Chancery and of the court of Requests was taking away much of the Council's purely equitable jurisdiction. The court of Admiralty took cognisance of many maritime and mercantile cases which formerly were brought before it. It was coming to be recognised that cases with which the ordinary courts could adequately deal should be left to them.[1] It was certain that it could not inflict the punishment of death.[2] Within these limits it acted freely.

We may roughly divide the cases which came before the Council into two classes (1) cases which in some way concerned the state; (2) private cases.

(1) The first class comprises many different kinds of cases. We have seen that matters concerning foreign trade and foreign merchants were regarded as peculiarly within the jurisdiction of the Council. Though many of these cases came before the court of Admiralty, the Council never seems to have ceased to take cognisance of them. Sometimes they determine them, sometimes they send them to the court of Admiralty, to the cinque ports, or to arbitration. Thus we get before the Council cases of piracy, prize, salvage, insurance, and miscellaneous disputes arising in the course of trade.[3] It intervened to arrange compositions with creditors in cases where the trader through no fault of his own had become insolvent. It sometimes even went so far as to imprison the creditor who would not assent to a reasonable composition.[4]

The court was deemed to be especially bound to look into matters which might concern the safety of the state. It acted, says Hudson,[5] as "the curious eye of the State and the King's Council prying into the inconveniences and mischiefs which abound in the Commonwealth." It was not strictly bound by the straight rules of the common law in dealing

[1] Dasent xx 251, an appeal is dismissed as fit for the justices.

[2] Hudson 118. It would appear that the court could only act, as the court of Chancery acted, by restraint of the person. The Council wrote in 1590 to Scotland (Dasent xix 380-382), "Theire Lordships had not onie aucthorytie orderlie by anie lawe (as Counsailors onlie of State) to sease anie lands and goods of anie subject which proceedings belonged onlie to Judyciall Courts, . . . but yet theire Lordships had don what they might doe in lyke cases, which was to commytt him the partie to pryson, there to remaine untill he performed theire order." This is borne out by the case of Saxy, below 280.

[3] They occur in all the volumes of the acts of the Privy Council, see especially Dasent xiv *xxviii*. [4] See e.g. Dasent xvii 56. [5] 126

with such matters. "By the arm of sovereignty it punisheth errors creeping into the commonwealth, which otherwise might prove dangerous and infectious diseases, or it giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea, although no positive law or continued custom of common law giveth warrant to it."[1] But such powers could only be used for weighty causes. If used for common cases it would destroy "order and course."[2]

On these principles the court acted in punishing libellous and scandalous words, conspiracy and false accusations, riots, fraud, maintenance, forgery,[3] and, above all, it saw to the due execution of the laws against recreants.[4] In fact the line was sometimes difficult to draw between a Star Chamber case and a case for the court of High Commission.[5] It could act more effectually than the ordinary courts because it could examine the parties,[6] and, where occasion required, it habitually employed torture.[7] In so acting the court made permanent and valuable additions to our criminal law. In fact it is clear that both the law itself and its administration needed improvement. Hudson supplies a striking illustration of the defects of the law.[8] One Saxy had by a forgery got judgment for £800 against his factor Hudson. Hudson was in prison, having been taken in execution upon the judgment so obtained against him. After the judgment had been got Saxy was convicted of the forgery; and yet the judge decided that this was no ground for relieving Hudson, "holding the judgment given so sacred that they would not deliver the innocent without the consent of the forger, who maliciously remained in prison himself, rather than he would deliver his wronged factor." The administration of the law was liable to be overborne by force, and its purity was not always above suspicion. Even the warrants of the Star Chamber itself sometimes could not be executed.[9] Officers sometimes raised riots to further their own ends under the pretence of justice.[10] Juries were habitually influenced. Hudson tells us that, during the hearing of a case of this kind, Robert, earl of Leicester, said that he did not know that writing a letter to influence a juror was an offence.[11] No less a person than Sir R.

[1] Hudson 107. [2] Ibid 214, 215. [3] Ibid. 62-123.
[4] Acts of the Privy Council passim.
[5] Allen v. Jemmat and others, Star Chamber Cases (C.S.) 72, 73.
[6] Coke, 4th Instit. 63. [7] Dasent iii 230, 407; iv 171, 201, 284. [8] 65, 66.
[9] Dasent xiii 106; xx *xxii*. The warrants of the court were sometimes forged, ibid xx 242; xxiv 486, 487. [10] Hudson 83. [11] Ibid 92.

Manwood, Chief Baron of the Exchequer, procured at the assizes a corrupt verdict in favour of one of his servants, and made use of his position to force one Roger Underwood, a very poor man, to give him a valuable chain.[1]

It is clear that these powers when honestly exercised were valuable and useful. It is true that the punishments inflicted often appear excessive and brutal. But we must remember in the first place that the enormous fines which it imposed were habitually reduced, for as Hudson says, they were imposed not "secundum qualitatem delicti," but "in terrorem populi";[2] and in the second place that, apart from political cases, the cruelty of the Star Chamber was the cruelty of the times rather than cruelty of the court.[3] The punishments awarded by statute law were quite as severe.

(2) The Council continually interfered in private disputes.

We have seen that the number of these cases was so great that it seriously interfered with the administrative work of the Council. Some of these cases were no doubt brought before the court because for various reasons it was impossible to get justice elsewhere.[4] Others were cases concerning corporate bodies with which the crown deemed itself to have especial concern,[5] whether they were trading corporations, Oxford or Cambridge colleges, or corporate towns.[6] But, when all deductions have been made, it is clear that the Council heard a large number of cases which were purely private. This is no doubt partly due to the fact that a stronger and purer justice could there be had. Partly also it is due to the fact that the age was litigious. When recourse to open force is prevented feuds will be prosecuted

[1] Dasent xix 424; xx 95, 219; xxii 449, 450 (1592), we have his submission and confession, "this day also the Lord Chief Baron having made and subscribed the above said submission before their Lordships touching his great offences and indignities committed to the dishonor of their Lordships in general, and to som of them in particular, and further promised to their Lordships that a chein formerly taken by the said Chief Baron from one Roger Underwood, a very poor man, pretending yt to be his own, should be forthwith delivered into the hands of the Lord Cobham, and likewize to be ordered by his Lordship for the matter in question touching the said chain, as in equity and conscience his lordship shal think meet and reasonable."

[2] Hudson 224; Baildon, Les Reportes, etc., lxii, and App. VII.; Gardiner i 284.

[3] Baildon lxii, lxiii.

[4] Thus Hudson said at p. 57, the court used to direct a trial and to order that the parties should abide by the result. He says that if this course were now pursued, "great titles would not have five verdicts on the one side and six on the other, and the land spent before the suit ended."

[5] Hudson 56.

[6] Dasent i 137 (City and Town of Oxford); ii 296 (Bailiffs of Oxford and Oriel College); vii 119 (City and Town of Oxford); xix 318-321 (St John's College, Oxford); xiv 44, 78 (Trade of soap boilers at Gloucester); xix 277 (Corporation of Waterford); xxii 444 (the towns of Colchester and Halstead, piracy of trade marks).

by litigation.[1] The court was open to all—"from king to beggar" as Hudson says.[2] The pertinacious litigant—even the personal litigant of the female variety[3]—made good use of their opportunities. A tailor's bill,[4] matrimonial squabbles,[5] testamentary suits,[6] the ownership of a horse,[7] disputes between landlord and tenant,[8] poaching,[9] sharp practice of all kinds were brought before the board.[10] "Nothing," says Mr Dasent, "is more remarkable than the constant devotion with which this comparatively trivial daily work was carried on by those whose whole energies might well have been absorbed in the anxious consideration of the dangers which were so closely besetting the country and the Queen. To Burghley and Walsingham, engaged in laboriously unravelling the tangled threads of a skein of conspiracy and murder, the details of the settlement of a quarrel between two Norfolk neighbours must have been supremely uninteresting; but they seldom missed a meeting of the Council."[11]

Perhaps the best description of the jurisdiction wielded by the Council is to be found in Mr Palgrave's summary.[12] Every word of it could be illustrated from the recently published proceedings. "When the law had to deal with a petty transgressor, the deerstealer, the forestaller, or the barrator, an inquest might be found able and willing to commit him to the gaol, or to place him under the gibbet; but greater offenders could scarcely be touched except for crimes against the state;

[1] This is a feature common to all ages. A similar use was made of the Spanish Inquisition, Ranke, Turkish and Spanish Monarchies, 62, 63 (Kelly's Tr.). When a province is newly settled in India there is an immediate rush of litigation to the courts, Maine, Early History of Institutions, 289. He says, "if the transition from one state of society to another in modern India was not sudden, but gradual and slow, as it universally was in the old Ayran world, we should see the battle with technicalities going on in Court at the same time that the battle was waged out of Court with sword and matchlock." This is just the picture presented to us by the Acts of the Privy Council. See e.g. Dasent xxii 226; and cp. Y.B. 12, 13 Ed. III. (R.S.) cxi, cxii; above 268 n. 1.

[2] 129.

[3] Baildon, Les Reportes, etc., lx. In Rilie v. Sheldon (1603) 161, a woman who appeared before the court after two verdicts against her, and sundry petitions to the queen, was called "a clamorous and impudent woman," and ordered to be whipped. Her husband was fined £20 for not better governing his wife. Lady Russel (1604, 1605) however had her say—"all the Courte and presence murmuringe and makynge greate noyse, gyving no care to anythinge she saide, her owne Counselle goinge from the barre allso; yet shee wente one wthoute any change or any waye abashed at all, in a very boulde and stoute manner . . . whose revenge of her tongue seemed to be the summe of her desire" (ibid 276). In 1602 the lords had made an order that no woman was to appear in person. It does not appear to have been observed.

[4] Dasent viii 144.

[5] Ibid vii 197; ix *xxiii*.

[6] Ibid xiv 49.

[7] Ibid i 29.

[8] Ibid x 78; xi *xxvii*, *xxviii*; xii 18; xiv *xxxi*.

[9] Ibid xi *xxvii*.

[10] Ibid xx *xx* and 126, 127, 133, 134.

[11] Dasent xiv *x*.

[12] Council 104-108.

therefore it became necessary that the mighty should be kept in awe by a tribunal which they could not influence or corrupt. And when the Pursuivant and the mace were dispatched to bring the lord before the council table, because no jury of the county could be bold enough to 'pass upon him'; this power, however it may afterwards have been misused, was indispensable for the preservation of the rights and liberties of the people.

"The full maturity of the Star Chamber is to be dated in the reign of Elizabeth. Except in political cases, it was then administered wisely and discreetly. Whatever necessity had existed which called for the creation of this court in earlier times, there still remained sufficient cause for its continuance. The sway of the ancient baronage was now extinct. Parliament, which under the Tudors had lost its authority as a court of direct jurisdiction, could afford no relief in those cases which emboldened the multitude of people in the days of the old monarchs to prefer their bills of complaints to the receivers of petitions: whilst many a fertile source of grievance required the control of a prompt and inquisitorial tribunal.

"The powers given by statute law to the inferior magistracy had accumulated into a most extensive authority. Oftentimes the authority was delegated to those who were unfitted for the trust. Whatever traditionary respect we may entertain for the *Old English gentleman*, it must be confessed that the character was then scarcely formed. The country abounded with knights and squires of the first edition, whose fathers had served in the hall of the great, or who had been humble courtiers at the palace, or had toiled in the shop of the city chapman, men without principle, or refinement, or education, and not subjected to the salutary check of public observation and public opinion. The annexation of the powers of the conservancy of the peace to the municipal authorities, raised up nests of petty tyrants in the smaller corporations. Much unsoundness lurked in the community at large. . . . Religion had lost its influence. The sudden changes and transitions effected by the civil power had lessened the faith of the people, and the punishments inflicted by contending parties on their opponents diminished their affection for the altar. Their consciences were seared. The feelings of honour exercised but a slight control: and fraud and cozenage took the place of misdeeds of a sterner age. From the Knight who seized the manor by virtue of the forfeited mortgage, down to the Bully of St Paul's Walk, who gulled the stripling

heir, there were many shades of delinquency; but the lively scenes of the dramatist, as well as the technical pages of the Reports, equally testify the prevalance of extortion and knavery. The judges who presided at the courts of common law exhibited a vigour of intellect which has never been excelled. They were deeply conscious of their duty. They venerated the sanctity of the judgment seat. But the forms of law entangled the suitors in a web of chicanery from which they could not be extricated. Many of the defects of trial by jury were removed. The juries had become judges of the facts given in evidence before them. But still the materials of which the *country* was composed were not always so perfect as the institution required. Though the heat and anger of the civil wars of the Roses had subsided, faction could still taint the array, and the sly yeoman was as easily warped in his judgment as in earlier times. Whatever safeguards had been provided by the common law against the abuse of judicial forms, they were now destroyed. 'Pledges to prosecute' became the fictions of the clerk; and he who had been harassed, or oppressed, or ruined by false indictments, or maintenance, or barratry, was left in the ordinary courts to the tardy and incomplete redress which they could only afford by engaging him in further contests. . . . The inferior ministers and officers of the courts often diverted the course of justice, and possessed great powers of oppression, which could not be reached by the ordinary process. In all these cases the suitor sought and found salutary relief in the Star Chamber. Every member of the Privy Council having the right of sitting in the Star Chamber, the judicial character of the 'Lords and others of the Council,' was so marked and prominent, that they appeared to form the ruling aristocracy of the kingdom. Their vigilant equity was the safeguard of the weak and feeble. The poor looked to them for aid. Rich and powerful men feared their state, gravity, and discretion. The highest powers of justice seemed to be vested in them. The kingdom was under their magistracy and rule."

Contemporary writers are no less enthusiastic. "It is," says Coke,[1] "the most honourable court (our Parliament excepted) that is in the Christian world. . . . And it is truly said, Curia Cameræ Stellatæ, si vetustatem spectemus est antiquissima, si dignitatem, honoratissima. This court, the right institution and ancient orders thereof being observed,

[1] 4th Instit. 65.

doth keep all England in quiet." Lord Bacon[1] called it "one of the sagest and noblest institutions of this kingdom."

The Court no doubt excited the professional jealousy of the common lawyers. But merely legal objections could not prevail against it till they were united to a constitutional and a religious opposition to the Stuart system of government in church and state.

(ii) The Constitutional Conflict.

The growing organization and jurisdiction of the court of Star Chamber, the creation of the various subordinate Councils throughout the country, the rapid development of the court of Chancery and the court of Requests, seemed seriously to threaten the supremacy of the common law system. All these courts acted upon principles, and by means of a procedure unknown to the common law. It was natural therefore that the common lawyers should take alarm. We have already described the contest between the Common Law Courts and the courts of Chancery and Requests. We shall see that in the latter half of the 16th century they made a similar attack upon the court of Admiralty. At the end of Elizabeth's reign they attacked the Council.

We have seen that in Edward VI.'s reign the students of the common law petitioned the Council to stop the growing encroachment of the Chancery and the civil law.[2] In the earlier years of Elizabeth's reign they do not seem to have been quick to resist the Council's interference with their jurisdiction.[3] But in the latter part of the reign the judges begin to criticise the proceedings of the Council. We can trace divergencies of opinion between the common lawyers and other members of the Council in the Star Chamber itself. The legality of the Star Chamber and of certain other branches of the Council begin to be questioned.

In 1591 the judges addressed to the Lord Chancellor and the Lord Treasurer an opinion as to imprisonments by the Council, "against the laws of the realm."[4] They complained that many had been imprisoned merely for prosecuting ordinary actions at the common law, that persons discharged by the Courts of Common Law had been again committed to prison; that persons had been imprisoned "till they would release the lawful benefit of their suits, judgments, or executions." They gave it as their

[1] History of Henry VII. [2] Above 247.
[3] Select Pleas of the Admiralty (S.S.) ii 22, 23, 113 n. 2.
[4] Printed in Prothero, Documents, 446.

opinion that a committal by the Queen's special command, by order from the Council, or for treason was good; "but if any person shall be committed for any other cause, then the same ought specially to be returned."

In a case reported in 1602[1] we find the professional feeling of the common lawyers strongly marked. Yelverton, judge of assize, had taken precedence of Burley, the vice-president of the Council of the North, on the strength of a statute of Richard II.'s reign.[2] For this he was summoned before the court of Star Chamber. "The Lord Admiral was bitter against the judges, and said that he thought that the professors of the law would press their honours, and titles, and dignities from them." The Secretary said that the Council of State could alter or order the placing of persons of honour or office. On the other hand the Lord Keeper and both the Chief Justices were for the judge—saying that the Council of State could not alter the course of the common law. One of them added that "he woulde be sorrye if yt coulde." On this occasion the court differed in opinion. But at another sitting, in the absence of the Chief Justice, it was ordered that Yelverton confess his fault at the assizes. In the end the Queen interfered and changed his circuit.

In this state of professional feeling we are not surprised that the legality of the jurisdiction of the Council was attacked, whenever it was possible to do so. We have seen that certain branches of the Council were founded upon statutory authority.[3] It was impossible to go behind this, unless it could be shown that such authority had been exceeded. An attempt to do this was made, but without success, in the cases of the Council of Wales and the Council of the North.

The Council of Wales and the Marches[4] had been, as we have seen, created by the prerogative; but it had been recognised by statute. In 1604 one Fairley had been imprisoned for disobedience to an order of the Council. He sued out his writ of Habeas Corpus. The writ was disobeyed by the Council. This ultimately brought on the question as to the territorial limits of the jurisdiction of the Council. The judges resolved that it had no jurisdiction over the

[1] Les Reportes, etc., 150. In the case of Falkland v. Mountmorris and others 1631 (Cases in the Star Chamber (C.S.) 19, 20) Hyde, C.J., lays far more stress on undue means taken to influence a jury than the rest of the court.

[2] 20 Rich. II. c. 3.

[3] Above 278.

[4] For this controversy see Bacon's Works vii 569-611. Bacon argued in 1605 for the jurisdiction.

English counties of Worcester, Hereford, Gloucester and Shropshire.[1] But though the authority of the Council within the four shires was in consequence much diminished, the crown did not intend to entirely relinquish it. It was seen that to do so would admit the illegality of all branches of the Council's jurisdiction founded, as the Council of the North was founded, on the prerogative alone. It was clear that the prerogative had usage, more or less recognised by the legislature, to support it. The royal advisers could hardly therefore consider it expedient to submit to the views of the common lawyers. In 1605 an attempt was made to deal with the matter by statute. But this failed; and in 1607, when Bacon was Solicitor-General, a series of reformed instructions were issued for the guidance of the Council. The royal claims were maintained; but the extraordinary criminal jurisdiction of the Council was practically confined to Wales. But, after the Parliamentary proceedings of 1605, the maintenance of even a civil jurisdiction aroused a strong opposition. In Herefordshire the bishop and twenty-six of the leading gentry protested. In Worcestershire the sheriff declined to obey the orders of the Council.

In 1608 the Privy Council decided to ask the judges whether the maintenance of the civil jurisdiction was legal; and it was decided to argue at the same time the question of the legal position of the Council of the North. This Council had also been recognised by two statutes.[2]

It was clear that a constitutional question of some importance had been raised. The case was argued for six days before the judges. It was fairly arguable either way. The opinion of the judges was given by Coke. As it was never published it was probably not favourable to the crown. This is the more probable, as Coke tells us, that in 1609 the judges resolved, that the criminal jurisdiction given to the Council of the North to hear and determine certain criminal offences at their discretion, and to decide real actions and other civil suits was illegal.[3]

The crown did not, however, abandon its claims to exercise jurisdiction through the Council either on the marches or in the north. In 1610 the grievances of the English counties were brought before Parliament. The king promised inquiry; but he did little more than promise. Though the agitation continued nothing was done; and in 1617 new instructions

[1] Coke, 4th Instit. 242, 243.
[2] 32 Henry VIII. c. 50; 13 Eliz. c. 13.
[3] 4th Instit. 245, 246.

profession at the beginning of James I.'s reign when he says[1] that, "being in the second part of this treatise to handle the jurisdiction of this high court [the Star Chamber], I must steer a course full of peril betwixt Scylla and Charybdis; for if on the one side I shall diminish the force, or shorten the stretching arm of this seat of monarchy, I should incur . . . much danger of reprehension; and if on the other side I should extend the power thereof beyond the due limits, my lords the judges, and my masters the professors of the common law, will easily tax me for encroaching upon the liberty of the subject, and account me not only unworthy of the name of my profession, but of the name of an Englishman."

As the controversy between the king and Parliament grew more bitter, it became more and more apparent that it could not be settled by merely legal reasoning. That controversy seemed to absorb all existing differences of opinion upon many varied matters, and to range the disputants in one of the two opposing camps. The upholder of the rights and privileges of Parliament, the common lawyer, the low churchman, and the Puritan opposed the upholder of the absolute prerogative, the upholder of the Council, and the high churchman. Both sides sought to prove their views by their interpretation of precedents drawn from history. In both cases the interpretation was one-sided. But we have taken our law from the Parliamentary statesman, and we are apt, therefore, to forget that the historical basis upon which it purports to rest is often questionable. The legal views of their opponents have been ruled to be erroneous; and we are too ready, perhaps, to think that they are erroneous because their historical basis is false.

The tyrannical proceedings of the Star Chamber aroused popular feeling against it.[2] It was, it is true, an efficient court where the case before it was not political. But the political cases, though they were the smallest part of its daily business,[3] made the most noise at the time, and have given to it its reputation in history. The Parliamentary statesman saw the expediency of abolishing the most efficient means of prerogative government. The common lawyer saw a means of at length triumphing over a rival judicature. The Puritan saw the fall of a court by which he had been

[1] At p. 49.

[2] See the cases of Prynne, Burton, and Bastwick, Gardiner viii 228-233.

[3] Les Reportes, etc., lii; Reports of Cases in the Star Chamber (C.S.); Gardiner vii 85.

persecuted.[1] The jurisdiction of the Council therefore fell with the victory of the Parliament in 1640.[2] The preamble to the Act is a good illustration of the historical method of the Parliamentary statesman. It is hardly less one-sided than the reading of history to be found in Finch or Berkeley's judgments in the *Case of Ship Money*. It adopted a legal theory which had been decisively condemned by the best lawyers of the day.

The preamble recites Magna Carta, and the statutes of Edward III.'s reign passed against the jurisdiction of the Council.[3] It recites the fact that it has no proper Latin plea roll, as by statute it ought to have. It recites the statute 3 Henry VII. c. 1 and its amendment by the statute 21 Henry VIII. c. 20, and states that the "judges have not kept themselves to the points limited by the said statute." These historical facts are evidently intended to show that the court is illegal. We have seen that they show nothing of the kind. But though we cannot take our history from preambles to statutes passed in times of political excitement, we still take our law as to the jurisdiction of the Council from this particular statute. We must therefore state its provisions in some detail.

The Star Chamber, the Council of Wales, the Council of the North, the jurisdiction of the Star Chamber exercised by the court of the Duchy of Lancaster, and the court of Exchequer of the county Palatine of Chester were abolished; and "from henceforth no court, council, or place of judicature shall be erected . . . within this realm of England or dominion of Wales, which shall . . . exercise the same or the like jurisdiction as is or hath been . . . exercised in the said Court of Star Chamber."[4] It was further enacted[5] "that neither His Majesty nor his Privy Council have, or ought to have, any jurisdiction . . . by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law." Penalties were imposed

[1] The limit was not clearly drawn between the jurisdiction of the Star Chamber and the High Commission, Cases in the Court of Star Chamber (C.S.) 72.

[2] 16 Car. I. c. 10. "An act for the Regulating of the Privy Council, and for taking away the court commonly called the Star Chamber."

[3] Above 267, 268. [4] 16 Car. I. c. 10 §§ 1, 4. [5] § 5.

upon any official who infringed the provisions of the Act.[1] The procedure upon the writ of Habeas Corpus was applied with improvements to the case of persons imprisoned by the Council.[2]

Thus a number of courts, and a body of law, which threatened to be a serious rival to the common law, came to an end. With the effect of this Act upon English law as a whole, and upon the jurisdiction of the Common Law Courts we cannot now deal fully. It will be sufficient to say that it is largely due to this Act that English law knows a theory of ministerial responsibility and not a system of administrative law. The Common Law Courts reaped the fruits of victory and permanently enlarged their jurisdiction, criminal and civil.

(3) The later history of the Council.

The Long Parliament had swept away the greater part of the judicial business of the Council But the Act referred only to English bills or petitions. The Council possessed an appellate jurisdiction from places outside the ordinary English law. This jurisdiction it still retained; and it has become of increasing importance with the expansion of the Empire. To it is largely due our present Judicial Committee of the Privy Council. We shall deal (i) with the constitution of this committee; and (ii) with its jurisdiction.

(i) The constitution of the Judicial Committee.

In 1667 we hear of a standing committee for trade, the foreign plantations, and to hear appeals from the islands of Jersey and Guernsey.[3] The attorney-general and the king's advocate were directed to assist the Council in the hearing of these appeals. In 1696 it was ordered that, "all appeals from any of the plantations be heard *as formerly* by a committee who are to report the matters so heard by them to His Majesty in Council"; and "that all the lords of the Council or any three of them be appointed a committee for that purpose."[4] It was this tribunal, sitting at the Cockpit, which heard appeals till 1833. The hearing was generally public; but there were no regular reports of the proceedings till 1829.[5]

In the interval the business of the committee had much increased. This was due in the first instance to the growth of the colonies and the rise of our Indian Empire.[6] In 1832

[1] 16 Car. I. c. 10 §§ 6, 7. [2] § 8.
[3] Cited Safford and Wheeler, The Practice of the Privy Council (Ed. 1901) 134.
[4] Ibid 135. [5] Selborne, Judicial Procedure in the Privy Council, 23.
[6] 13 Geo. III. c. 63, provides for the establishment of a supreme court at Fort William, and enacts (§ 18) that appeals shall lie to His Majesty in Council.

the court of Delegates was abolished and its jurisdiction over ecclesiastical and admiralty appeals was handed over to the Privy Council.[1] For these reasons an act was passed in 1833 "for the better administration of justice in His Majesty's Privy Council."[2]

The Act constituted the following persons members of the Judicial Committee:—The President of the Council, the Lord Chancellor, and such members of the Privy Council who hold or shall have held the offices of Lord Keeper or First Commissioner of the Great Seal, Chief Justice of any of the three Common Law Courts, Master of the Rolls, Vice-Chancellor, Judge of the Prerogative Court of the Archbishop of Canterbury, Judge of the Court of Admiralty, Chief Judge in Bankruptcy, and, in ecclesiastical cases, every archbishop or bishop being a privy councillor. The crown was empowered to appoint two other persons to be members, to summon other members, or to direct the attendance of the judges.[3] By the Judicial Committee Act of 1871 the crown was empowered to appoint four paid members of the Judicial Committee from among the judges of the superior courts, or the Chief Justices of the High Court in Bengal, Madras, or Bombay.[4] By the Appellate Jurisdiction Act of 1876 the archbishops and bishops have ceased to be members of the committee, but in certain cases they may be called in as assessors.[5] "They are neither members of the court nor admitted to its private conferences. They are present only during the public hearing and do not vote. They are not either formally or in substance responsible for the judgment."[6]

Any four of these persons formed a quorum.[7] This number was subsequently reduced to three.[8] Provisions were made as to the procedure of the committee upon certain points and upon costs.[9] It was directed that the report of the committee should be read in open court.[10] In other respects the practice and procedure of the Council was unchanged.[11]

In two important respects the practice and procedure of the Judicial Committee differs from that of the House of Lords.

[1] 2, 3 Will. IV. c. 92.
[2] 3, 4 Will. IV. c. 41.
[3] 3, 4 Will. IV. c. 41 §§ 1, 6, 16, 30.
[4] 34, 35 Vict. c. 91.
[5] 39, 40 Vict. c. 59 §§ 14, 24.
[6] Selborne, Judicial Procedure in the Privy Council, 43.
[7] 3, 4 Will. IV. c. 41 § 5.
[8] 6, 7 Vict. c. 38.
[9] 3, 4 Will. IV. c. 41 §§ 7-15.
[10] 3, 4 Will. IV. c. 41 § 3.
[11] Selborne, Judicial Procedure, etc., 26, 27.

(1) The Judicial Committee is not bound by its own decisions.

(2) It had always been the practice of the Privy Council, dating certainly from the orders of the 17th century, never to notice in their report to the crown any dissentient opinion.[1] It was resolved to adhere to that practice in 1833. It was further enforced by an order of 1878.[2] In fact, there have only been three cases in which there has been any publication of dissentient opinions.[3] This rule is supported mainly on the ground that it adds moral weight to a tribunal which must give the law to many different races in different stages of civilization.[4] This consideration is no doubt decisive. At the same time it is obvious that the student or the historian of law, and perhaps even the legislature, derive considerable benefit from the opposite practice followed in the House of Lords.

The practice in both these matters springs from the fact that the Judicial Committee is a committee of an executive council. As we shall see, when we deal with the jurisdiction of the Judicial Committee, it is not easy, even at the present day, to quite clearly divide judicial from executive functions. The act of 1833 no doubt gives to the Judicial Committee many of the essential characteristics of a court. But Lord Selborne pointed out that, "when the Judicial Committee is spoken of as a Court or a tribunal, having jurisdiction, and delivering judgments, those who use that phraseology do not mean, that it has, like the other Courts, a delegated, but self-contained and independent judicial function; the whole legal operation, which receives its final consummation and sole efficacy from the direct official action of the Sovereign in Council is always implied. This may be called form; and so may all other acts of the royal authority when exercised according, not to arbitrary rule, but to constitutional usage. But such forms are facts; and their influence has determined the whole course of procedure in this jurisdiction, including its procedure in judgment."[5] Historically, however, it is the oldest of our royal courts. The act of the crown in allowing or dismissing an appeal, according to the advice contained

[1] Selborne, Judicial Procedure, etc., 27-30.

[2] It was ordered that the ancient rule be strictly adhered to, "that no disclosure be made touching the matters treated of in council, and no publication made by any man how the particular voices went."

[3] Two cases of Mr Gorham in 1853, and the case connected with Essays and Reviews in 1864. See Phillimore, Eccl. Law (Ed. 1895) 975-977.

[4] Selborne, Judicial Procedure, etc., 54-63.

[5] Judicial Procedure, etc., 44, 45.

in the report of the Judicial Committee, is the direct lineal descendant of the judgment given by the king in person in the Curia Regis.

(ii) The jurisdiction of the Judicial Committee.

(*a*) Appellate jurisdiction over the foreign dominions of the crown.

Appeals from the Channel Islands were the earliest instances of this branch of the Council's jurisdiction. The jurisdiction was extended by analogy to the Isle of Man, and to all the foreign plantations of the crown. With the growth of the colonies it has become by far the most important part of the jurisdiction of the Judicial Committee.

The Channel Islands were anciently part of the Duchy of Normandy. Their law is founded upon the laws and customs of Normandy.[1] As early as the reign of Edward III. the court of King's Bench decided that it had no jurisdiction over these islands; "ideo recordum retro traditur cancellario ut inde fiat commissio domini regis ad negotia prædicta in insula prædicta audienda et terminanda secundum consuetudines insulæ prædictæ."[2] An order in council of Henry VII.'s reign (1495) directs that all appeals from these islands shall go, not to any English court, but to the King and Council.[3] An order to a similar effect was made in 1565.[4] The courts at Westminster, and especially the court of Chancery and the court of Requests, were prohibited from hearing causes there arising. In 1572 an order was issued regulating appeals from Jersey;[5] and this is probably the earliest order in council passed with this object. A similar order relating to Guernsey was made in 1580.[6] Hudson treats the jurisdiction as well settled.[7] We have seen that these appeals are specially alluded to in the order of 1667.

The jurisdiction of the Judicial Committee in relation to these appeals contains one archaic trait. An appeal in early law often takes the form of a personal complaint against the judge.[8] The Channel Islands possess a peculiar appeal termed

[1] Hale, Common Law, 266, 267; Coke, 4th Instit. 286; 8 S.T. N.S. App. C.

[2] Cited Hale, Common Law, 267, 268.

[3] Cited Safford and Wheeler 228; see 8 S.T. N.S. App. C for an account of various orders in council relating to the Channel Islands.

[4] Ibid 229. [5] Ibid 229,233. [6] Ibid 224, 247.

[7] Star Chamber 62. He evidently thinks it strange that ordinary cases should be tried there as a matter of course. "How it is drawn to the council table from a public court of justice I know not; sure I am, it is more proper the subject should appeal for justice to a public court of justice rather than to a private board, although the most honourable in the world." Dasent viii 61, 75, 76; xv 286, 335.

[8] P. and M. ii 663-665. "The idea of a complaint against a judgment which is not an accusation against a judge is not easily formed."

a 'doléance.' It has been defined to be "a personal charge against a judicial officer—a personal charge either of misconduct or of negligence."[1] It still exists in a modified form as a convenient form of procedure, which can be used without implying any disrespect to the judge whose conduct is the subject of complaint.[2]

The Isle of Man[3] was originally part of the kingdom of Norway. In the reign of Edward III. the Earl of Salisbury conquered the island from the Scotch, and received a grant of it from the king. He sold it to William le Scroope. Henry IV. seized it after Scroope's rebellion, and granted it to the Earl of Northumberland. After his rebellion it was granted in 1405 to the house of Stanley. It remained in that family until it was sold in 1765 to the crown.

The question of the right of the Council to hear appeals from the Isle of Man does not appear to have been raised till the case of *Christian v. Corren* in 1716.[4] The Council asserted its right to hear appeals on the ground that a right to apply to the crown for redress for wrongs done by any court existed in all cases where there was a tenure from the crown. Parker, C.J., expressly compared it with the copyholder's right to apply to the court of Chancery. "Lord Derby also, at length, rather than that some things in the grant made by the crown to his ancestors should be looked into, chose to submit and express his consent."

In fact it was becoming recognised that the crown in Council was the proper tribunal to hear appeals from English dominions outside England, or outside the jurisdiction of the English courts. In 1683 it had been decided that an appeal lay to the King in Council from the county Palatine of Chester.[5] In 1724 it was laid down generally that all appeals from the plantations ought to be heard by the King in Council.[6]

The appellate jurisdiction of the Council is founded upon the principle that it is the prerogative of the crown to entertain applications for redress from its subjects. The subject has as a rule no right to appeal unless that right has been specially conferred upon him.[7] Such grant may be contained

[1] Crédit Foncier of England v. Amy (1874) L.R. 6 P.C. at p. 155. It was termed "odious" by the code of 1771.

[2] Ex parte Nicolle (1879) L.R. 5 A.C. at p. 348.

[3] For its earlier history see Coke, 4th Instit. 283; Hale, Common Law, 255; Attorney-General for Isle of Man v. Mylchreest (1879) L.R. 4 A.C. 294, 301.

[4] 1 P. Wms. 329. [5] Jennet v. Bishop, 1 Vern. 184.

[6] Fryer v. Bernard, 2 P. Wms. 262.

[7] Mayor of Montreal v. Brown and Springle (1876) L.R. 2 A.C. 168, 184. The case turned on French Canadian law. "It must be borne in mind that the

in a statute, ordinance, letters patent, charter, order in council, or in the instructions to the governor.[1] But the subject can always petition the crown for leave to appeal; and the crown can grant such leave in civil or criminal cases, unless that right has been expressly taken away by the legislature. To take away the prerogative of the crown to grant such leave express words must be used. The mere statement that the decision of the court of any colony shall be final will not suffice.[2] The only instance in which this right has been thus expressly taken away, is the clause in the act establishing the Australian Constitution, which provides that the crown shall not be able to grant leave to appeal upon any question, "as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States," unless the High Court of Australia certifies that the question is one which ought to be determined by the Council.[3]

The conditions under which leave to appeal will be granted differ according as the case is civil or criminal.

In civil cases it has been laid down that leave to appeal should not be granted, "save when the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the question is otherwise of some public importance or of a very substantial character."[4] It is of course impossible to lay down any rule which will cover all cases. Even if a case does comply with the requisites of public importance, and substantial character, the judgment appealed from may appear to the Council to be so clearly right that they will refuse leave.[5]

The Council is much slower to grant leave to appeal in

rule of law in this country that an appeal does not lie unless given by express legislative enactment, does not prevail in French or Canadian law, when the presumption is in favour of the existence of what one of the judges of the Queen's Bench in Canada terms 'the sacred right of appeal.'"

[1] Safford and Wheeler 710.

[2] Johnston v. The Minister and Trustees of St Andrew's Church (1877) L.R. 3 A.C. 159. In so far as Cuvillier v. Aylwin, 2 Knapp P.C. 72, lays down a contrary rule it has been overruled, re Louis Marois (1862) 15 Moo. 189, 193; Cushing v. Dupuy (1880) L.R. 5 A.C. at pp. 417, 418.

[3] 63, 64 Vict. c. 12 § 74. The section goes on to provide that, "except as provided in this section this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council."

[4] Prince v. Gagnon (1882) L.R. 8 A.C. at p. 105.

[5] La Cité de Montreal v. Les Ecclesiastiques, etc. (1889) L.R. 14 A.C. at p. 662.

criminal cases. To make a practice of granting leave in such cases would offer a serious obstruction to the administration of justice. "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."[1]

(*b*) The act of 1832 constituted the Judicial Committee of the Privy Council the final court of appeal in ecclesiastical causes.[2] Later statutes dealing with ecclesiastical matters have in some cases added to their jurisdiction.[3] But the acts of 1857,[4] which transferred the ecclesiastical jurisdiction over Probate and Divorce to the newly constituted Probate and Divorce court, provided that appeals in such matters should go to the House of Lords.

(*c*) The same act of 1832 provided that the Judicial Committee should be the court of final appeal from the court of Admiralty, from the Vice-Admiralty courts in the colonies, and from all Prize Courts.

(*d*) The Judicial Committee by statute takes cognisance of certain matters of a quasi judicial character. Applications for the extensions of patents,[5] and applications for a licence to print a book, when the proprietor of the copyright refuses to publish after the author's death,[6] come before the Judicial Committee. Applications in connection with the alteration of the statutes of the Universities of Oxford and Cambridge came before a committee of the Council, now called the Universities Committee, two of the members of which must be the Lord Chancellor and a member of the Judicial Committee.[7] It is provided generally by the act of 1833 that the crown may specially refer any matter it sees fit to the Judicial Committee.[8] Before the act the crown was in the habit of referring many quasi judicial matters to the Council.[9] Lord Campbell vividly describes the hearing of the petition

[1] In re Abraham Mallory Dillett (1887) L.R. 12 A.C. at p. 467, cp. Falkland Island's Co. v. The Queen, 1 Moo. P.C. N.S. 312; Reg. v. Bertrand (1867) L.R. 1 P.C. at p. 530; Ex parte Deeming L.R. 1892, A.C. 422.

[2] 2, 3 Will. IV. c. 92

[3] 3, 4 Vict. c. 86; 55, 56 Vict. c. 32.

[4] 20, 21 Vict. cc. 77, 85.

[5] 5, 6 Will. IV. c. 83; 46, 47 Vict. c. 57 § 25.

[6] 5, 6 Vict. c. 45 § 5

[7] 25, 26 Vict. c. 26 § 1 (Oxford); 19, 20 Vict. c. 88 (Cambridge); 40, 41 Vict. c. 48 § 44.

[8] 3, 4 Will. IV. c. 41 § 4.

[9] But then the council might apparently refuse to hear cases so referred, 2 Knapp. 103.

of the House of Assembly of Massachusets for the recall of the Lieutenant-Governor and Chief Justice in 1774. The petition was contemptuously rejected, and Franklin, the agent for Massachusets, was dismissed from his office. It is probable that the action of the Privy Council on this occasion conduced, more than any other single event, to the American civil war.[1] Under the statutory power many miscellaneous questions have been so referred:—A dispute between the legislative council and the legislative assembly of Queensland;[2] a question as to the validity of certain orders in council relating to Jersey;[3] disputes between two prelates.[4] When matters are thus referred to the Judicial Committee the question is discussed merely judicially. If it is desired to discuss them from a political point of view the matter is referred to a mixed committee.[5]

These quasi judicial functions exercised by the Judicial Committee at the present day may help us, by way of analogy, to understand some of the difficulties which meet us in the earlier history of the Council. There is no doubt that the Judicial Committee is a perfectly distinct committee of the Council possessing most of the characteristics of a law court. But we can see that it hears cases quite different in kind from those which come before an ordinary law court; and that in some cases its members sit upon other committees of the Council. We can hardly expect to find that the relations between the Council and the Star Chamber are precisely defined in the 17th century, when, in the present century, we see the members of the Judicial Committee taking cognisance of matters not strictly judicial, and assisting other committees of the Council in the work of administration.

[1] Campbell, Chancellors, vi 104-111.
[2] Safford and Wheeler 775.
[3] In the matter of the States of Jersey (1853) 8 S.T. N.S. 285.
[4] Re the Bishop of Natal 3 Moo. P.C. N.S. 116, 156, 157.
[5] Safford and Wheeler 770.

## CHAPTER VII

## COURTS OF A SPECIAL JURISDICTION

IN this chapter we shall consider certain courts which administer a body of law outside the jurisdiction of the Courts of Common Law and the Courts of Equity. These courts fall into four groups:—(1) The Courts which administer the Law Merchant; (2) The Court of the Constable and the Marshal; (3) The Courts of the Forest; (4) The Ecclesiastical Courts. Some of these courts, and some of the bodies of law which they have created, still continue to be outside the ordinary jurisdiction of the courts of law and equity. Others have practically ceased to exist. Others have been absorbed into their system. At an early stage of their history the Council and the Chancery had an intimate relation with many of these courts.[1] This connection with the Council has been maintained, and even strengthened. It was to the Judicial Committee of the Privy Council that appeals were, and in some cases still are brought from such of those courts of a special jurisdiction which still remain.

(1) The Courts which administer the Law Merchant.

The Law Merchant of primitive times comprised both the maritime and the commercial law of modern codes. From the earliest period in their history an intimate relationship has subsisted between them. Both applied peculiarly to the merchants, who, whether alien or subject, formed in the Middle Ages a class very distinct from the rest of the community. Both laws grew up in a similar manner from the customary observances of a distinct class. Both laws were administered in either the same or in similar courts, which were distinct from the ordinary courts. Both laws differed from the common law. Both had an international character.[2]

[1] Above 199-202.

[2] "The maritime law is not the law of a particular country, but the general law of nations," Ld. Mansfield, Luke v. Lyde (1759) 2 Burr. 887. "The law of merchants is jus gentium and the judges are bound to take notice of it," Mogadara v. Holt (1691), Shower 318.

(*a*) Maritime Law.

We find that the maritime laws of the Middle Ages were contained in certain bodies of local customs, which, like all customary law, showed a tendency to expand as they grew older. These bodies of custom took their name from some one port. They were adopted by other ports, and one or other of them ruled the coasting trade of the whole of mediæval Europe.[1]

The body of customs adopted by England, and inserted at a later date into the Black Book of the Admiralty,[2] were the judgments of Oleron. They originated in the laws of the commune of Oleron. They were adopted by the seaport towns of Normandy and Brittany. They were transplanted to Damme, Bruges, and to England.[3] A copy of Edward II.'s reign, representing an early version, is to be found in the archives of the city of London,[4] and in the Red Book of Bristol.[5] Such was the repute of these laws of Oleron that mariners of other countries came there to obtain the judgment of its court.[6]

The body of customary sea laws in force in the Mediterranean was known as the Consolato del Mare. It is probably of Catalan origin.[7] It was probably drawn up in the 15th century for the use of the Consuls of the sea at Barcelona, from older collections of the customs of seaport towns within the kingdom of Aragon,[8] just as the Black Book was drawn up from the laws of Oleron for the use of the court of Admiralty in England. Before they had thus been reduced to writing they had been introduced into the Mediterranean ports, as the laws of Oleron had been introduced into the ports of the Atlantic and the North Sea. "They were introduced from Barcelona first of all into Valencia, then into the island of Majorca, then into Sicily, then into Roussillon, all of which countries were under the sceptre of the kings of Aragon before any version of them was printed at Barcelona. Within half a century after they were printed in the Book of the Consulate of the Sea at Barcelona, they were translated into the languages of Castile and of Italy. They were further translated into French before the conclusion of the 16th

[1] Black Book of the Admiralty (R.S.) ii xxxix seqq.

[2] This was a collection of documents compiled for the use of the Court of Admiralty not earlier than Henry VI.'s reign. See Black Book R.S. iii x; and for its contents i xxviii seqq.

[3] Black Book of the Admiralty i lxiii. Cp. R.P. iii 498 (4 Hy. IV. n. 47).

[4] Ibid lxvii.

[5] L.Q.R. xvii 234.

[6] Black Book of the Admiralty ii xxxvii.

[7] Ibid iii xxxiv.

[8] Ibid iii xxxv.

century, into Latin some time in the 17th century, into Dutch at the beginning of the 18th century, and into German in the course of the same century."[1]

From the Baltic we have two codes of sea laws. One comes from Lubeck;[2] another from Wisby.[3] While Lubeck exercised a preponderating influence upon trade within the Baltic, Wisby exercised a similar influence upon the trade of the Baltic with foreign ports. The famous collection of the maritime laws of Wisby are compiled from three sources. The first is a Baltic source, and the earliest laws to be attributed to that source come from Lubeck. The second is a Flemish source and represents a Flemish version of the laws of Oleron. The third is a Dutch source, and represents the laws observed in the city of Amsterdam.[4]

Other towns possessed bodies of sea laws of their own. We possess the laws of Amalphi[5] and of Trani.[6] It is clear from the Domesday of Ipswich that that town possessed a court in which pleas relating to maritime matters were pleaded from tide to tide.[7] But these three codes—the laws of Oleron, the Consolato del Mare, and the maritime laws of Wisby, became the leading maritime codes of Europe. In fact these codes, "form as it were a continuous chain of maritime law, extending from the eastermost parts of the Baltic sea, through the North sea, and along the coast of the Atlantic to the Straits cf Gibraltar, and thence to the furthest eastern shores of the Mediterranean."[8]

(*b*) Commercial law.

Similarly in mercantile matters we find that various towns have their codes of customs by which mercantile transactions are governed. As we might expect, the towns which possessed laws dealing with maritime matters were the towns to which some sort of mercantile laws were a necessity. Oleron,[9] Barcelona,[10] and Wisby[11] all possessed such bodies of law. In England we have the White Book of London,[12] the Red Book of Bristol,[13] and the Domesday of Ipswich.[14] Just as the various seaport towns imitated the customs of some one port, so the various towns modelled their charters and their laws upon certain of the more famous towns in England, such as

[1] Black Book of the Admiralty iii lxxiii.
[2] Ibid iv xxi, xxii.
[3] Ibid iv xxiii.
[4] Ibid iv xxvii, seqq.
[5] Ibid iv vii-xv.
[6] Ibid iv xv, xvi.
[7] Ibid ii 23.
[8] Ibid iv xxvi, xxvii.
[9] Ibid ii 254 seqq.
[10] Ibid iii lxix-lxxii.
[11] Ibid iv 265, 386.
[12] Munimenta Gildhallæ, R.S., vol. iii.
[13] L.Q.R. xvii 246.
[14] Black Book of the Admiralty ii 16-207.

London, Bristol, Oxford, or Winchester.[1] In the Carta Mercatoria and the Statute of the Staple we get special codes of rules adapted to foreign merchants.[2] The body of rules so used by the chief trading towns of Europe is known to the Middle Ages as the Law Merchant. It is, in fact, the private international law of the period.

It is clear that both the maritime and the commercial law of the Middle Ages grew up amid similar surroundings, governed the relations of persons engaged in similar pursuits, was enforced in similar tribunals. It is not therefore surprising that, from that time to this, the relations between them have always been of the closest.[3] Even in England, where they have come to be applied in different courts, it has been impossible to ignore their close connection. Both, as we have seen, have appeared to English judges to be rather a species of jus gentium than the law of a particular state. In spite of the efforts of the Courts of Common Law, the attempt to separate them has produced much inconvenience,[4] and has only partially succeeded. "It was," says Sir Travers Twiss, "the practice of the consuls of the sea, before pronouncing their decision to consult the Prudhomes of the sea and the Prudhomes of the merchants . . . In the High Court of Admiralty of England it is the practice for the judge to be assisted by two of the Elder Brethren of the Trinity House of Deptford-le-Stroud, whilst the registrar of the court, at a subsequent stage of the proceedings, has the assistance of two merchants."[5]

[1] For a table illustrating this affiliation of mediæval boroughs see Gross, The Gild Merchant, i App. E.

[2] Below 311, 312.

[3] At this period they are usually classed together. Select Pleas of the Admiralty (S.S.) i xix, in 1313 justices to settle piracy claims are to proceed "secundum legem et consuetudinem dicti regni et similiter legem mercatoriam. Ibid xxii, in 1320 a similar direction to arbitrators between England and Flanders in a case of spoil. Ibid xxiv, complaint that a ship of Placentia had been spoiled by one of Bristol; the case was heard by a jury of mariners and merchants "prout de jure et secundum legem mercatoriam foret faciendum." In the 17th century Malynes, when he wrote his Lex Mercatoria, found it necessary to devote a large part of treatise to the sea laws. In the preface he says, "And even as the roundness of the globe of the world is composed of the earth and waters; so the body of the Lex Mercatoria is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth." Cp. ibid 87. "For without navigation commerce is of small account." At p. 303, when considering the courts peculiar to merchants, he deals first with the Admiralty court.

[4] In 1833 a select committee recommended an extension of the jurisdiction of the Admiralty so as to enable it to "exercise concurrent jurisdiction in questions of title to ships generally, and of freight, and possibly of some other mercantile matters, with a power of impannelling a jury of merchants, if the judge think fit or either of the parties require it," Williams and Bruce, Admiralty Practice (Ed. 1886) 13 n. k.

[5] Black Book of the Admiralty iii lxxx.

Such, then, was the nature of the Law Merchant. We must now consider the history of the tribunals which administered it. Their history will fall into three periods:—(i) The period when the Law Merchant, maritime and commercial, is administered in local courts. (ii) The rise of the Court of Admiralty and its jurisdiction. (iii) The decay of the special courts administering the commercial part of the Law Merchant and its absorption into the common law system.

(i) The period when the Law Merchant, maritime and commercial, is administered in local courts.

Up to the reign of Edward III. the Law Merchant in both its branches is administered by local courts.

*Maritime Courts.*

The courts which have jurisdiction in maritime matters are for the most part the courts of seaport towns. The admiral is not an official who holds a court with a fixed jurisdiction. He is an official who rules a fleet, having incidentally certain disciplinary powers over those under his command. These powers "probably enabled the admiral to deal with depredations committed by the ships immediately under his command; but it does not appear to have included a power to hold a court administering justice generally in maritime cases."[1]

In the earlier part of the Middle Ages we meet with many seaport towns which had, in the language of later law, an Admiralty jurisdiction. The Domesday of Ipswich tells us that, "the pleas yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that abydene not but her tyde, shuldene ben pleted from tyde to tyde."[2] Padstow and Lostwithiel possessed similar courts which sat at tide time on the seashore. Yarmouth possessed a court of like nature.[3] The court at Newcastle dates from Henry I.'s reign.[4] It would appear from the Red Book of Bristol that a court sitting at a seaport was one of the recognised tribunals of the Law Merchant.[5] The Book itself contains rules upon maritime matters.[6] When the court of Admiralty

[1] Select Pleas of the Admiralty (S.S.) i xli. It was a court "for military action not for civil jurisdiction," Spelman (Works, Ed. 1727), Admiralty Jurisdiction, 221. The sheriff also had some authority by royal writ at this period. Cp. Selden, Mare Clausum, ii c. 14. [2] Black Book of the Admiralty ii 23.

[3] Select Pleas of the Admiralty i xiii, xiv.

[4] Stubbs, Sel. Ch. 112. "Inter burgensem et mercatorem si placitum oriatur, finiatur ante tertiam refluxionem maris."

[5] L.Q.R. xvii 246. It is said that the lex mercatoria attaches to markets, and markets are held in five places "in civitatibus, nundinis, *portubus super mare*, villis mercatoriis, et burgis." [6] Ibid 249.

was established many towns, jealous probably of their ancient rights, got by royal charter exemption from its jurisdiction.[1] Though their privileges were recognised by the legislature,[2] they were jealously watched by the crown and by the court of Admiralty. In 1570 Elizabeth found it necessary to complain of the encroachments made by the mayor's court of the city of London upon the Admiral's jurisdiction.[3] We find that at different periods in the 15th and 16th centuries the jurisdiction of Tynemouth, Scarborough, Chester, King's Lynn, Harwich, Dartmouth and Chester are either called in question by, or successfully asserted against, the court of Admiralty.[4] All these local Admiralty jurisdictions were swept away in 1835 by the Municipal Corporations Act.[5] The only local jurisdiction left is one which is possibly older than them all, the jurisdiction of the Cinque Ports. "It presents the type and original of all our Admiralty and maritime courts."[6]

From the earliest times the Cinque Ports had the right to hold pleas, and the right to wreck. They were always exempt from the jurisdiction of the Admiralty. Owing probably to the antiquity of their jurisdiction, this exception is not expressly given in their Charters. When in 1856 the general civil jurisdiction of the Lord Warden of the Cinque Ports was abolished, his Admiralty jurisdiction was saved.[7] In 1869, when Admiralty jurisdiction was given to the new county courts, it was provided that appeals in Admiralty cases from the county courts within the jurisdiction of the Lord Warden should lie to him.[8] Their jurisdiction is not touched by the Judicature Act of 1873, and still survives.[9]

The Admiralty jurisdiction, thus exercised by the local courts, was supervised and controlled by the crown. The crown was for many reasons specially interested in Admiralty

[1] Select Pleas of the Admiralty (S.S.) i xiv. 15 Rich. II. c. 3 recites that the jurisdiction of the Admiral prejudices "many Lords, Cities and Boroughs through the realm."

[2] 2 Henry V. St. 1 c. 6; 32 Henry VIII. c. 14; 5 Eliza. c. 5 § 42; 27 Eliza. c. 11.

[3] Select Pleas of the Admiralty (S.S.) ii xii, xiii. Cf. Legge v. More, ibid i 83 (1539). [4] Ibid ii xix-xxi. [5] 5, 6 Will. IV. c. 76.

[6] Select Pleas of the Admiralty (S.S.) ii xxi. Cp. Lord Warden of the Cinque Ports v. the King (1831) 2 Hagg., Admir. 438, 443, 444.

[7] 18, 19 Vict. c. 48 § 10. [8] 31, 32 Vict. c. 71 § 33.

[9] 46, 47 Vict. c. 18 § 13 (Municipal Corporations Act 1883); 57, 58 Vict. c. 60 § 571 (Merchant Shipping Act 1894). The regular place for the sitting of the court was the aisle of St James's Church, Dover. For convenience the judge now often sits at the Royal Courts of Justice.

cases. Foreign affairs were peculiarly within its province. The Courts of Common Law had no adequate machinery for supervising the actions or the transgressions of foreigners. Such matters frequently gave rise to diplomatic questions in the shape of expensive claims for compensation. In fact we shall see that it was largely owing to the necessity the crown was under of protecting itself against such claims that the creation of the court of Admiralty was due.

In this period the crown supervises the doings of the local courts in the following ways.

Writs are sometimes sent to the mayors and bailiffs of the seaport towns directing them to proceed.[1] If they did not obey the writ they were attached for contempt. Sometimes special commissions are issued to the king's justices or others to try cases of spoil or piracy.[2] It was very often impossible for a foreigner, who had been spoiled of his goods, to get justice from an English jury.[3] Such persons often petitioned the Council. The petition in such cases was often referred to the Chancellor;[4] but it was sometimes heard by the Council, and writs were issued according to the result of the trial.[5] In 1353 we hear of such a case being tried by the Admiral and the Council.[6] This is, as we shall see, just before the first mention of the Admiral's court.

The Courts of Common Law sometimes, but rarely inter-

[1] 1315 writ to mayor and bailiffs of Rye to inquire into a ship spoiled by pirates in Orwell haven, the goods of which had been taken to Rye; neglect to send the pirates before the king as ordered; writ to the constable of Dover Castle to arrest the mayor and bailiffs (Select Pleas of the Admiralty (S.S.) i xx). 1323 writ to sheriff of Gloucester to arrest a ship with the help of the mayor of Bristol, and to try the case in the mayor of Bristol's court (ibid xxiv). 1328 writ to the sheriff of Southampton to arrest French goods (ibid xxvi). 1352 writ to the mayor of Southampton to arrest certain pirates and bring them before the Council (ibid xxxix). 1349 Pilk v. Venore, case removed from Bristol court into the Chancery; the Bristol court applied the law of Oleron (ibid ii xliii).

[2] 1308 Edward II. issued a commission to certain "auditores" to inquire of spoils alleged to have been committed by Frenchmen upon Englishmen (Select Pleas of the Admiralty (S.S.) i xviii). 1338 commission to certain persons to inquire as to ships of the Count of Gueldres which had been spoiled (ibid xxvii). 1339 commission to Stonore and two others to try a case of piracy committed by English upon Spanish, Portuguese, and Catalan merchants in Southampton water (ibid xxix).

[3] Ibid xxiii.

[4] Ibid xxv. 1325 a petition by one whose ship had been robbed at sea by the men of Yarmouth. 1327 in a case of piracy of English upon Frenchmen.

[5] Ibid xxxviii, a case of 1343; xxxix a case of 1352; 1347 the Council orders restitution of goods taken by pirates, and, in default, the arrest of those to whom the goods had come.

[6] Ibid xl.

fered in such matters.[1] They had in fact no jurisdiction over contracts made or torts committed abroad.[2]

With respect to crimes committed out of the bodies of counties, the question how far the Common Law Courts had jurisdiction is perhaps more doubtful. Hale asserts that they did possess such jurisdiction before 1365. He cites eight cases of the reigns of Edward I., II., and III.[3] These cases do not however completely prove Hale's position, as Cockburn, C.J., points out in *Reg. v. Keyn.*[4] It is not, however, improbable that, at a period when the court of Admiralty did not exist, the ordinary courts did sometimes exercise such jurisdiction. Criminal cases are still tried by a jury,[5] and in cases of piracy the commissioners are sometimes directed to proceed "secundum legem et consuetudinem regni nostri." Generally, however, the procedure is "secundum legem mercatoriam," or, "maritimam."[6] The maritime law is clearly a law apart from the common law and practically identified with the law of the merchants.

*Commercial Courts.*

The courts which administer the commercial law of the period necessarily present features very similar to the courts which administer the maritime law. The law merchant applied both to the domestic trader and to the foreign merchant.[7] Both formed in a sense a separate class. But, as we might expect, the separation is far more clearly marked in the latter than in the former case.

[1] It would appear that in 1296 (case cited by Selden iii 1895) the Common Pleas declined to recognise the jurisdiction of the Admiral and asserted that it had general jurisdiction. The court said it could try a murder committed at sea as well as on the land when the murderer came to land. The MS. from which Selden cites has disappeared (Select Pleas of the Admiralty i xvii, xviii). 1322 action to recover damages for spoil at sea in the King's Bench (ibid xxiii). 1323 a case before the Bristol court moved by certiorari into the King's Bench (ibid xxiv).

[2] At the end of the 14th century it would appear that there was no remedy for breach of charter party made abroad, Copyn v. Snoke (ibid ii lix). In 1280 it was decided that the Common Law Courts had no jurisdiction over torts committed abroad (ibid ii xliii, xliv).

[3] Hale, 2 P.C. 12-15.

[4] (1876) L.R. 2 Ex Div. 163-167. "It appears that of these eight cases four were in the nature of a civil remedy, and, as it would seem were properly within the jurisdiction of the Court of King's Bench; four were cases of piracy, which may have been dealt with on the principle that piracy is triable anywhere and everywhere. Moreover as to two of the latter cases, it is doubtful whether the offence was not committed within the body of a county, and therefore triable at common law."

[5] Ibid i xxi, xxii, xxiv; Black Book of the Admiralty i 45, 49, 83.

[6] Ibid i xvi. In 1377 a case of piracy is tried at common law "secundum legem et consuetudinem regni ac legem maritimam." There is a proviso that this is not to be an encroachment on the Admiral's rights, ibid i xlviii.

[7] The term merchant at this period was not confined to large traders. It embraced all who traded. The distinction between the craftsman and the merchant is later, Gross, Gild Merchant, i 107 and n. 2.

The courts which administer this branch of the Law Merchant are chiefly the courts of fairs, the courts of the more important towns, and the courts of the Staple.

In the fairs of the Middle Ages much of the internal and foreign trade of the country was conducted. The right to hold a fair meant the right to hold a court of pie powder for the fair.[1] A statute of 1477[2] recites that in this court, "it hath been all times accustomed, that every person coming to the said fairs, should have lawful remedy of all manner of contracts, trespasses, covenants, debts, and other deeds made or done within any of the same fairs, during the time of the said fair, and within the jurisdiction of the same, and to be tried by the merchants being of the same fair." Later cases confined the jurisdiction of the fair strictly within these bounds.[3] Sometimes these courts were held by the mayor of a corporate town.[4] Sometimes they belonged to a lord. Of the latter class was the fair of St Ives.[5] We can see that merchants from all parts of England, and even from abroad, attended this fair. In the pleadings of the court of this fair we have mention of the communitates of Stamford, Nottingham, Leicester, Huntingdon, Godmanchester, Bury St Edmunds, Wiggenhall, and Ypres. These fairs were not peculiar to England. "By means of them almost all foreign trade was for centuries conducted. In the fairs of Champagne . . . Besançon and Lyons in France . . . Antwerp in the Low Countries, and not least in the fairs of Winchester and Stourbridge in England, goods were bought and sold; orders were given and taken; outstanding payments were made there; and there obligations to be discharged at future fairs were contracted. To these gatherings, which lasted for

[1] The style of such court is, Curia Domini Regis pedis pulverisati tenta apud civitatem X, coram majore et duobus convicibus secundum consuetudines civitatis a tempore cujus etc., ac sec'. privilegia et libertates concessa et confirmata (or if a franchise fair, coram A.B. senescallo feriæ). Bracton f. 334 a speaks of persons, qui celerem habere debent justitiam, sicut sunt mercatores quibus exhibetur justitia pepoudrus; Coke, 4th Instit. 272; Rastell's Entries f. 168 b, 169. [2] 17 Ed. IV. c. 2 § 3.

[3] Howel v. Johns (1600) 1 Cro. 773. Error of a judgment in the court of the fair of Gloucester, in an action on the case for words. The error assigned was that the words were spoken before the market began. Judgment reversed, "they cannot meddle with any matter in that court, but with what happens in the market the same day. They also held that this was not an action proper for that court; for it is only for matters of contracts, and for matters arising within the market, and by occasion of the market, as batteries or disturbances happening therein. But if the words were by occasion in the same market it might peradventure be otherwise." Cp. Goodson v. Duffield (1612) Cro. Jac. 313; Hall v. Pyndar (1556) Dyer 132 b, pl. 80, and cases cited in the margin.

[4] For the curious right of the Cinque Ports to hold a fair at Yarmouth see Arch. Cantiana xxiii 161-183. [5] Select Pleas in Manorial Courts (S.S.) 130.

several days, flocked merchants from all parts of Europe. The dealings of the merchants necessitated the use of simple rules; no technical jurisprudence peculiar to any country would have been satisfactory to traders coming from many different countries."[1] The customs of different places may have slightly varied;[2] but the law, in its broad lines, as laid down by the merchants in these courts, was necessarily of the international character which has always been its chief characteristic.

The towns had in many cases the right, either by charter or by prescription, to hold various courts, of pie powder and otherwise, in which the Law Merchant was administered, in addition to many other kinds of jurisdiction, civil and criminal. The Domesday of Ipswich distinguishes many different kinds of pleas. Those which concern the Law Merchant are clearly distinct from the others.[3] The Red Book of Bristol describes the differences existing between the Law Merchant and the common law, and treats generally of the law and procedure of merchant courts.[4] Similarly the White Book of London describes the special usages which prevail where the merchants are concerned.[5] Many other towns also, as we can see from the reports, had the right to hold courts for the merchants.[6] Some of these courts still exist. The Lord Mayor's court in London,[7] the Tolzey court, and a branch of it sitting in time of fair as a Pie Powder Court, at Bristol,[8] the Liverpool court of passage,[9] are examples of survivals from a time when the Law Merchant was generally administered in local courts.

The merchants not only had special courts and a special law, they were also differentiated from the rest of the community by a special organization. In the charters of the towns there is frequent mention of the Guild Merchant. This

[1] Smith, Mercantile Law (Ed. 1890) Introd. lxix, lxx.

[2] The Carta Mercatoria (Munimenta Gildhallæ (R.S.) ii pt. i 206, 207) implies this, "Et si forsan supra contractu hujusmodi contentio oriatur, fiat inde probatio vel inquisitio, secundum usus et consuetudines feriarum et villarum mercatoriariarum ubi dictum contractum fieri contigerit et iniri."

[3] Black Book of the Admiralty (R.S.) ii 23. "The plees be twixe straunge folk that man clepeth pypoudrus," "The pleas in tyme of fayre be twixe straunge and passant," "The pleas yoven to the law maryne."

[4] L.Q.R. xvii 246.

[5] Munimenta Gildhallæ (R.S.) iii f. 191 b.

[6] Above 308 n. 3.

[7] Coke, 4th Instit. 247; Bl. Comm. iii 80.

[8] L.Q.R. xvii 237 n. 3.

[9] Regulated by 56, 57 Vict. c. 37. Other instances are the Derby Court of Record; Exeter Provost Court; Kingston-upon-Hull Court; Newark Court of Record; Northampton Borough Court; Norwich Guildhall Court; Peterborough Court of Common Pleas; Preston Court of Pleas; Romsey Court of Pleas; Southwark Court of Record; Worcester City Court of Pleas.

was an association of traders within the town, and, in some cases, of traders living outside its precincts, for the better management of trade.[1] It sometimes arbitrated upon mercantile disputes.[2] But as a rule it did not exercise a regular jurisdiction. Its chief function was that of a trades union of a rigidly protective character.[3] It was only those who belonged to the Guild Merchant who could trade freely within the town. Its conduct was sometimes so oppressive that trade was driven from the town.[4] In fact all the various privileges, jurisdictional and administrative, which the towns possessed could be, and often were used in a manner adverse to the commercial interests of the country. The foreign merchant was hampered at every turn by the privileges of the chartered towns. They were averse to allowing him any privileges except those which they had specially bargained to give to him.[5] "The Great Charter provides that merchants may freely enter and dwell in and leave the realm; but the same Great Charter confirms all the ancient liberties and customs of London and the other boroughs, and thus takes away with one hand what it gives with the other. The burghers have a very strong opinion that their liberties and customs are infringed if a foreign merchant dwells within their walls for more than forty days, if he hires a house, if he fails to take up his abode with some responsible burgher, if he sells in secret, if he sells to foreigners, if he sells in detail."[6]

The crown, on the other hand, was for many reasons interested in supporting the foreign merchant. The crown was able to take a broader view of the commercial interests of the country than any set of burghers. Its intelligence was also quickened by the fact that it was easier to negotiate a supply from the alien merchant in return for protection, than

[1] Gross, Gild Merchant, i chap. iii. "The words, 'so that no one who is not of the Gild may trade in the said town except with the consent of the burgesses,' which frequently accompanied the grant of a Gild Merchant, express the essence of this institution" (p. 43).

[2] L.Q.R. xvii 238.

[3] Gross, Gild Merchant, i 43-50. As to the distinction between Gild and Borough see ibid chap. v. This distinction tended to become obliterated in the 14th century (p. 76). With other privileges that of having a Gild Merchant helped on the idea of municipal incorporation (p. 105). "The judicial authority of the Gild Merchant was at first very limited, its officers forming a tribunal of arbitration, at which the brethren were expected to appear before carrying their quarrels into the ordinary courts. The functions of these officers were inquisitorial rather than judicial. But in some places their powers appear to have been gradually enlarged during the 13th century so as to embrace jurisdiction in pleas relating to trade" (p. 65).

[4] Ibid 52 and Statutes there cited.

[5] For specimens of such bargains by London with the merchants of Amiens, Corbeil, and Nesle see Munimenta Gildhallæ (R.S.) iii 164-175.

[6] P. and M. i 447, 448.

to deal with a Parliament.[1] For these reasons the needs of the crown gave to the alien merchant a defined position—in some respects superior to that of the native merchant—and the protection of a separate set of courts.

In 1303 the Carta Mercatoria[2] gave to certain foreign merchants, in return for certain customs duties, exemption from certain municipal dues, freedom to deal wholesale in all cities and towns, power to export their merchandize, and liberty to dwell where they pleased. They were promised speedy justice "secundum legem mercatoriam" from the officials "feriarum, civitatum, burgorum, et villarum mercatoriarum"; and any misdoings of these officials were to be punished. If the mayor and sheriffs of London did not hold their court from day to day another judge was to be substituted for them. In all pleas, except those of a capital nature, half the jury was to consist of foreign merchants. No future grant of liberties to any town was to derogate from the rights conferred upon the foreign merchants.

The growth of the powers of Parliament in Edward III.'s reign gradually prevented the crown from obtaining supplies by separate negotiations with the alien merchants.[3] But in his reign (1353)[4] similar privileges and a larger measure of protection was secured to them by the Statute of the Staple.

With a view to the better organization of foreign trade and the more convenient collection of the customs, certain towns, known as the Staple Towns, were set apart.[5] It was only in those towns that dealings could take place in the more important articles of commerce, such as wool, woolfells, leather, lead, and tin. Eleven such towns were named for England, one for Wales, and four for Ireland.[6] In each of these towns special courts were provided for the merchants who resorted thither. A mayor and two constables were to be chosen annually to hold the court of the Staple; and the authorities of the town in which the Staple was held were ordered to be attendant upon them.[7] They were to apply

[1] Stubbs, C.H. ii 170, 208-210, 572.

[2] Munimenta Gildhallæ (R.S.) ii pt. i 205-211.

[3] Stubbs, C.H., ii 576. In 1362 and 1371 it was enacted that the merchants should not set any subsidy on wool without the consent of Parliament.

[4] 27 Ed III. St. 2.

[5] The Staple system dates from Edward I.'s reign. After several changes it was consolidated by this statute (Stubbs, C.H. ii 447, 448). After the statute changes were made in the places where the Staple was held, Gross, Gild Merchant, i 141-143. To be a Staple town was a privilege highly prized; for as Coke says (4th Instit. 238) "riches followed the Staple."

[6] 27 Ed. III. St. 2 c. 1.

[7] Caps viii and xxi.

the Law Merchant, and not the common law. All manner of pleas concerning debt, covenant, and trespass fell within their jurisdiction. The jurisdiction of the king's courts was excluded except in cases touching freehold or felony.[1] The mayor and constables had the assistance of two alien merchants, one of whom was chosen from the merchants who came from the north, the other from the merchants who came from the south.[2] Provision was made for the trial of cases in which aliens were concerned by a mixed jury, and for an appeal in cases of difficulty to the Chancellor and the Council.[3] A speedy means was provided for the recovery of goods of which merchants had been robbed at sea, or which had been cast away and thrown up on the shore.[4] Merchants going and returning to the Staple towns were protected against purveyance.[5] They were promised lodgings in the towns at a reasonable rent.[6] They were taken into the king's special protection.[7] These privileges are specially stated to be granted notwithstanding any privilege, franchise, or exemption granted to any towns or individuals.[8]

All these courts administered, and, by administering, helped to create, the Law Merchant. With the merchant, his courts, and his law the common law had little concern. He is protected by his special courts and can, in the last resort, appeal to the Chancellor and the Council.[9] The law is a customary law known to the merchants who can, if need be, inform the king's courts of its contents.[10] Fleta notices that it is a peculiar law.[11] A statute was needed to abrogate the rule of this law that one townsman is liable, as a kind of surety, for the debt of his fellow townsman.[12] The rule that if a debtor could not pay, money in the hands of his debtor could be attached, was common to many towns.[13] The statute merchant and the statute staple gave to English and foreign merchants a right of recourse against their debtor's land.[14]

[1] 27 Ed. III. St. 2 c. v, vi, viii, and xxi. [2] c. xxiv. [3] c. viii and xxiv
[4] c. xiii. [5] c. iv. [6] c. xvi.
[7] c. xx. [8] c. xxviii. [9] Above 306.

[10] In Edward II.'s reign a dispute on a question of law arising in the fair of St Ives was brought into the King's Bench. Twelve merchants from London, Winchester, Lincoln, and Northampton were summoned to give evidence as to the law, Plac. Abbrev. 321 (cited Select Pleas in Manorial Courts (S.S.) 132).

[11] II. 58. 5; II. 61. 2.

[12] 3 Ed. I. c. 23; 2nd Instit. 204. For a case of 34 Ed. I. illustrating this rule as applied to Foreign Merchants see Hale, 2 P.C. 13 n. a.

[13] I.e. Foreign Attachment. Munimenta Gildhallæ (R.S.) iii 41. Cp. Tross v. Michell, Cro. Eliza. 172; Paramore v. Veral, 2 Anderson 151; Malynes, Lex Mercatoria, 290, 291; Cox v. Mayor of London, L.R. 2 H. of L. 239.

[14] 11 Ed. I. (Statute of Acton Burnell); 13 Ed. I. St. 3; 27 Ed. III. St. 2 c. 9.

The common law as yet knows but little of these rules. A writing obligatory payable to bearer is known among the merchants as early as the 13th century. The first English case upon a bill of Exchange in the Common Law Courts is of the year 1603.[1]

In this period, as we have said, the merchant courts and the merchant law are so closely connected with the maritime courts and maritime law that we may regard them as branches of the same Law Merchant. In the middle of the 14th century the rise of the court of Admiralty causes a cleavage between these two branches of the Law Merchant. The cleavage is widened by the action of the Common Law Courts. Their jealousy confines the court of Admiralty rigidly to maritime causes, and leads them to appropriate to themselves jurisdiction over commercial causes. In the end they assimilate what they have appropriated, and construct our system of mercantile law.

(ii) The rise of the Court of Admiralty and its Jurisdiction.

(*a*) *The rise of the Court of Admiralty.*

The earliest mention of the term Admiral is in a Gascon Roll of 1295, in which Berardo de Sestars is appointed Admiral of the Baion fleet.[2] There are similar mentions of Admirals in these Rolls in 1296 and 1297. In 1300 Gervase Alard is appointed Admiral of the Cinque Ports; and this appears to be the earliest use of the title in England. "It would appear that the title of Admiral, originating probably in the East, and afterwards adopted by the Genoese and other navies of the Mediterranean, came by way of Gascony to England, and was there adopted about the beginning of the 14th century."[3]

We have seen that in the earlier part of the 14th century the Admiral did not possess any jurisdiction except a disciplinary jurisdiction over the fleet under his command.[4] He does get such jurisdiction about the middle of the 14th century, owing to the diplomatic difficulties in which the king found himself involved, from the want of some efficient authority to coerce the marauding and piratical propensities of his subjects.

[1] Martin v. Boure, Cro. Jac. 6-8.

[2] Select Pleas of the Admiralty (S.S.) i xii. The Black Book of the Admiralty (i 56, 72) contains references to an Admiralty court in the reigns of Henry I. and John. These are apocryphal tales of the 14th century, Select Pleas of the Admiralty i xi. [3] Ibid xii.

[4] Above 304; Lambard, Archeion (Ed. 1635) 49, 50. The court of Admiralty for some time exercised a jurisdiction over the navy, and merchant ships in time of war. The last remnant of it was suits against merchantmen for carrying naval flags, Encyclopædia Britannica (10th Ed.) Tit. Admiralty.

It appears from the documents contained in the record known as the "Fasciculus de Superioritate Maris" that the kings of England had been constantly negotiating with foreign countries—more especially with France and Flanders—as to claims in respect of piracies committed by English subjects.[1] From 1293 to 1337 attempts had been made at arbitration. In 1337 Edward had made payments out of his own pocket to the Flemings, the Genoese, and the Venetians. The claims of the French were put an end to by war. In 1339 a commission was sitting to consider the piracy claims made by Flanders. It may be that the resolution to erect a court of Admiralty was the result of recommendations made by that commission. At any rate the battle of Sluys (1340) gave to England that command of the sea, which had been already claimed in the 13th century, and so rendered the erection of such a court the more possible. "It is not unreasonable to suppose that after the battle of Sluys Edward III., acting upon the advice of the commissioners of 1339, extended the jurisdiction of the Admiral, which had up to that date been mainly disciplinary and administrative, so as to enable him to hold an independent court and administer complete justice in piracy and other maritime cases."[2] We have seen that the older methods of administering justice in such cases had been found to be very unsatisfactory. In 1353 a case was heard before the Admiral and the Council.[3] In 1357 there is the earliest distinct reference to a court of Admiralty.[4] In 1360 John Paveley is appointed "capitaneus et ductor" of the fleet, with powers, not only disciplinary, but also judicial.[5] In 1361 the commission to Sir Robert Herle confers upon him similar powers, and gives him power to exercise them by a deputy.[6]

[1] The documents contained in the Fasciculus are described in Select Pleas of the Admiralty i xxx-xxxiv. It contains (1) the case of certain English merchants in respect of depredations committed between 1297 and 1304. It claims for England the sovereignty of the sea of England. It is printed by Coke, 4th Instit. 142-144. (2) The appointment of commissioners to advise as to French Piracy claims; partially printed by Coke, 4th Instit. 144. (3) A treaty made by Ed. I. with Count Guy of Flanders 1297. (4) A document addressed to commissioners appointed to deal with piracy claims by Flanders; partly printed Coke, 4th Instit. 144.

[2] Select Pleas of the Admiralty i xxxv, xxxvi.

[3] Ibid xl.

[4] Ibid xli, xlii. The King of Portugal had made a claim on behalf of a Portuguese subject in respect of goods taken by an Englishman from a French vessel. Edward III. says that the Admiral had adjudged them to belong to the English captor.

[5] "Querelas omnium et singulorum armatæ prædictæ audiendi et delinquentes incarcerandi, castigandi, et puniendi, et plenam justitiam, ac omnia alia et singula quæ ad hujusmodi capitaneum et ductorem pertinent, et pro bono regimine hominum prædictorum necessaria fuerint faciendi, prout de jure et secundum legem maritimam fuerit faciendum" (ibid xlii).

[6] Ibid xlii, xliii.

This power was probably inserted in order to provide a judge for the new court. There were at first several Admirals and several courts. From the early 15th century there is one Lord High Admiral, and one court of Admiralty. In 1482 we have an actual patent of the judge of the court.[1]

The earliest parts of the Black Books of the Admiralty, which refer to the office and the court of the Admiral, probably date from the period between 1332 and 1357.[2] It is clear that the jurisdiction of the court is as yet new. There is an article expressly directed against the withdrawal of cases from the court.[3] In 1361 a commission of oyer and terminer was recalled on the ground that the matter fell within the jurisdiction of the Admiral's court.[4] In 1364 a writ of supersedeas issued to the judges on the ground that the Admiral had already tried the case.[5] In 1375 the inquisition of Queenborough was held in order to ascertain certain points of maritime law.[6] We shall see that the new court aroused the suspicions of Parliament and that its jurisdiction was limited by statute.[7] But the part of the Black Book dealing with the procedure and practice of the court (which dates from the 15th century) shows us that its jurisdiction is becoming settled.[8]

Under Henry VIII. the court of Admiralty considerably extended and settled its jurisdiction. In that reign much attention was paid to naval matters. Trinity House was incorporated in 1516. Deptford dockyard was constructed at about the same period. The records of the court began in 1524.[9] It was settled in 1585 that the judge of the court of Admiralty, though a deputy of the Admiral, did not cease to be judge during a vacancy of the office of Admiral.[10] The criminal jurisdiction of the court was extended; and just as the crown had asserted its jurisdiction in ecclesiastical matters, so it asserted an increased jurisdiction, through the court of Admiralty and the Council, in maritime and commercial causes. The Council records show how close was the connexion between the Council and the Admiralty.[11]

[1] Select Pleas of the Admiralty i lv. It empowers him, "ad cognoscendum procedendum et statuendum de et super querelis causis et negotiis omnium et singulorum de hiis quæ ad curiam principalem Admirallitatis nostræ pertinent."
[2] Parts A, B, and C. See Black Book i xxviii, xxix.
[3] Ibid i 69.
[4] Select Pleas of the Admiralty i xlv.
[5] Ibid.
[6] Black Book of the Admiralty i 132 seqq.
[7] Below 317.
[8] i 178-220; 246-280; 345-394.
[9] Select Pleas of the Admiralty i lvii.
[10] Ibid ii xii.
[11] Dasent i 154, 155; iii 149, 467, 469; vii *xviii*; xiv *xxviii*; xx *xiv-xvi*; xxiv 196, 356, 385-393, 403-405.

During the Tudor period the court sat at Orton Key near London Bridge.[1] Later it sat, like the Ecclesiastical Courts, at Doctors' Commons.[2] We shall see that the determined attack of the Common Law Courts in the 17th century left the court with but a small part of the jurisdiction which it had asserted under the Tudors, and denied it the status, which it had formerly possessed, of a court of record.[3]

Statutes of this century restored to the court of Admiralty some parts of the jurisdiction of which the Common Law Courts had deprived it. They restored also its status of a court of record, and gave to the judge of the Admiralty many of the powers possessed by the judges of the superior Courts of Common Law.[4]

Appeals from the court of Admiralty lay originally to the king in Chancery. This is clear from a statute of 1533.[5] The king on each occasion appointed *judices delegati* to hear the appeal. In the Tudor period these Delegates were civilians. In later times a judge of one of the Common Law Courts was associated with them. In 1563 it was enacted that their decision should be final.[6] We get the records of the Court of Delegates from the beginning of the 17th century. We have seen that in 1832 the jurisdiction of the Delegates was transferred to the Council, and that in 1833 the Judicial Committee of the Council was formed to hear such appeals.[7]

(*b*) *The jurisdiction of the Court of Admiralty.*

In the 14th and 15th centuries the jurisdiction of the Admiralty is somewhat wide and vague. It comprises the ordinary criminal and civil jurisdiction of later days,[8] the Prize jurisdiction,[9] and the jurisdiction over wreck, and the other droits of the crown or the Admiral.[10] The procedure of the court was becoming fixed upon the models

[1] Select Pleas of the Admiralty i lxxix; Bl. Comm. iii 69.

[2] In fact the judge of the court of Admiralty and the Dean of the Arches were often the same person (Anson, the Crown, 417). 3, 4 Vict. c. 65 § 1 provided that the Dean might sit for the judge of the Admiralty court.

[3] Select Pleas of the Admiralty i xlv. A writ of supersedeas, issued in 1364, implies that it is a court of record. The contrary was stated, Coke, 4th Instit. 135; cp. Sparks v. Martyn (1668) 1 Ventris 1.

[4] 24 Vict. c. 10 §§ 14, 17, 23, 24; below 327.

[5] 25 Henry viii c. 19 § 4. For earlier commissions to hear appeals see Select Pleas of the Admiralty ii lix-lxii.

[6] 8 Eliza. c. 5. This was not necessarily so before, Select Pleas of the Admiralty i 18-20.

[7] Above 293.

[8] Select Pleas of the Admiralty i xlvi-liv.

[9] Ibid xli, xlii; Rhymer, Fœdera, vi 14, 15.

[10] Ibid xliv, xlv; ibid ii xxv, xxvi.

rather of the civil than of the common law.[1] Its jurisdiction was beginning to encroach upon the rights of those seaport towns which possessed Admiralty jurisdiction.[2] For these reasons the court aroused a Parliamentary opposition similar in kind to that aroused by the jurisdiction of the Council. The result of this opposition was seen in two statutes of Richard II.'s reign which defined the jurisdiction of the Admiralty. 13 Richard II. St. 1 c. 5 recites that "a great and common clamour and complaint hath been often times made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office." It enacts that, "the admirals and their deputies shall not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of King Edward, grandfather of our Lord the King that now is." 15 Richard II. c. 3 enacts more specifically, "that of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's court shall have no manner of cognizance, power, nor jurisdiction." But, "nevertheless, of the death of a man, and of a mayhem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognisance."[3] In view of further petitions as to the encroachments of the Admiral's court, it was enacted in 1400 that those sued wrongfully in that court should have a right of action for double damages.[4] Petitions were still directed against the court and its procedure.[5] But these statutes effected some

[1] Black Book of the Admiralty (R.S.) i 178-220.

[2] R.P. iii 322 (17 Rich. II. n. 49) the towns of Bristol, Bridgewater, Exeter, Barnstaple and Wells complain of the encroachments, errors, and delays of the court. Appeals, they say, have been pending 3 years and more, "pur diverse delaies de la ley de Civill, et subtill ymagination de les parties pleintiffs." Cf. Sampson v. Curteys (Select Pleas of the Admiralty i 1) and Gernesey v. Henton (ibid 17) which bear out the statements in the petition.

[3] The statute also (§ 4) recognises the disciplinary powers of the Admiral.

[4] 2 Henry IV. c. 11.

[5] R.P. iii 498 (4 Hy. IV. n. 47), the prayer is for the enforcement of remedies against the admirals and their deputies, "et auxi que les ditz Admiralles usent lour Leies tant soulement par la Ley de Oleron et anxiens Leyes de la Meer, et par la Leye d'Engleterre, et nemye par Custume, ne par nulle autre manere"; R.P. iii 642 (11 Hy. IV. n. 61), the prayer is that the justices of the peace may have power to enquire into the doings of the Admirals and their agents.

settlement of the court's jurisdiction; and the Courts of Common Law maintained their observance by the issue of writs of supersedeas, certiorari or prohibition.[1]

We have seen that the reign of Henry VIII. witnessed a revival of interest in the navy and an increased activity in the court of Admiralty. A statute of 1540[2] gave to the Admiral a jurisdiction in matters of freight and damage to cargo. The patents of Henry VIII.'s admirals not only omit the proviso to be found in earlier patents, confining their jurisdiction within the limits marked out by the statutes of Richard II.'s reign, they also insert a non obstante clause dispensing with those statutes.[3] We begin to be able to classify the jurisdiction of the court under the following heads:—

(1) Ordinary or "Instance" Jurisdiction. This comprises—
  (*a*) Criminal Jurisdiction.
  (*b*) Civil Jurisdiction.
  (*c*) Admiralty Droits.
(2) Prize Jurdisdiction.

(1) Ordinary or Instance Jurisdiction.

(*a*) *Criminal Jurisdiction.*

We have seen that after 1363 the Admiral's criminal jurisdiction was recognised as exclusive on the high sea.[4] This exclusive jurisdiction could be exercised over British subjects, over the crew of a British ship whether subjects or not, over any one in cases of piracy at common law.[5] It could be exercised over no other persons.[6] The act of Richard II. recognised also a jurisdiction in cases of homicide and mayhem committed in ships below the bridges.[7] This jurisdiction

[1] Coke, 4th Instit. 137, 138; Select Pleas of the Admiralty ii xli.

[2] 32 Henry VIII. c. 14.

[3] The patent of Henry Duke of Richmond (1525) gives him power "audiendi et terminandi querelas omnium contractuum inter dominos proprietarios navium ac mercatores seu alios quoscunque cum eisdem dominis ac navium ceterorumque vasorum proprietariis pro aliquo per mare vel ultra mare expediendo contractuum omnium et singulorum contractuum ultra mare proficiendorum vel ultra mare contractuum et in Anglia et ceterorum omnium quæ ad officium Admiralli tangunt. . . . Aliquibus statutis, actubus, ordinationibus, sive restrictionibus in contrarium actis editis ordinatis sive provisis, non obstantibus," Select Pleas of the Admiralty i lviii. The later commissions are very similar; but they omit the non obstante clause.

[4] 13 Rich. II. St. 1 c. 5; 15 Rich. II. c. 3.

[5] Stephen, H.C.L. ii 27-29. In cases of piracy by statute, jurisdiction only exists over British subjects.

[6] R. v. Keyn (1877) 2 Ex Div. 63. The effect of the decision was overruled by the Territorial Waters Act (41, 42 Vict. c. 73). The Act declares that offences committed by anyone within the territorial waters of the crown, i.e. on the sea to such a distance as is necessary for the defence of the dominions of the crown, are within the jurisdiction of the Admiral.

[7] 15 Rich. II. c. 3.

was, up to low water mark, concurrent with that possessed by the Courts of Common Law.[1]

We have seen that the procedure in the Admiral's court had come to be modelled on the procedure of the civil law. The early precedents for trial by jury were not followed.[2] Trial by witnesses took its place. In 1536 dissatisfaction with this method of trial produced a statute, the ultimate effect of which was to transfer to the Courts of Common Law the criminal jurisdiction of the Admiralty.[3]

The statute recites that those who have committed crimes upon the sea, "many times escaped unpunished because the trial of their offences hath heretofore been ordered . . . before the Admiral . . . after the course of the civil laws; the nature whereof is, that before any judgment of death can be given against the offenders, either they must plainly confess their offences (which they will never do without torture or pains) or else their offences be so plainly and directly proved by witness indifferent, such as saw their offences committed, which cannot be gotten but by chance at few times, because such offenders commit their offences upon the sea, and at many times murder and kill such persons being in the ship or boat where they commit their offences, which should witness against them in that behalf; and also such as should bear witness be commonly mariners and ship men, which, because of their often voyages and passages in the seas, depart without long tarrying." It provides that treasons, felonies, robberies, murders and confederacies, committed in any place where the Admiral has jurisdiction, shall be enquired into and tried by commissioners appointed by the crown as if the offences had been committed on land. The commissions can be issued to the Admiral, his deputy, or three or four other substantial persons to be appointed by the Lord Chancellor. In 1799 this Act was extended to the trial of all offences committed on the high seas.[4]

The three or four substantial persons to be appointed under the act of Henry VIII. came to be invariably the judges of the Common Law Courts. The indirect result of the act was, therefore, to transfer the criminal jurisdiction of the Admiralty to the Courts of Common Law.[5]

[1] 5 Co. Rep. 107 (Sir Henry Constable's case). "Below the low water mark the Admiral has the sole and absolute jurisdiction. Between the high water mark and low water mark the common law and the Admiral have *divisum imperium* interchangeably."

[2] Select Pleas of the Admiralty (S.S.) i liv.

[3] 28 Henry VIII. c. 15.

[4] 39 Geo. III. c. 37.

[5] Stephen, H.C.L. ii 19.

Special commissions under this act have been rendered obsolete by later legislation. In 1834 the Central Criminal Court Act gave to that court the jurisdiction of these special commissioners.[1] In 1844 a similar jurisdiction was given to the ordinary justices of oyer and terminer and gaol delivery.[2] Provisions to the same effect are contained in the Criminal Law Consolidation Acts[3] and the Merchant Shipping Acts.[4]

The criminal jurisdiction of the Admiralty has thus for three centuries been exercised by the Courts of Common Law. It has, for this reason, almost wholly lost the international character which marked all branches of the maritime law in the Middle Ages. Piracy "at common law" is perhaps the only crime, which still retains some trace of an international character, in the rule, that it can be tried by the court of any country wherever and by whomsoever committed. The criminal jurisdiction of the Admiralty, having been administered by the ordinary courts, has become part and parcel of the common law, to be spelt out of English statutes, to be changed only as that law is changed. This fact was strikingly illustrated by *Reg. v. Keyn*.[5] No consensus of international jurists was held sufficient to give to the English courts a criminal jurisdiction over foreigners not recognised by English law. Cockburn, C.J., denied that a consensus of jurists could effect, in maritime law, what, in another branch of the old law merchant, he allowed might be effected by a consensus of merchants.[6] The case was decided by a bare majority. We may, perhaps, conjecture that it would have been decided the other way, if the criminal jurisdiction of the Admiralty had been freely developed in the court of Admiralty, and not in the Courts of Common Law.

(*b*) *Civil Jurisdiction.*

We have seen that under the Tudors the court of Admiralty claimed a wide jurisdiction. It seemed inclined to disregard altogether the limitations which statutes had imposed upon it. The extent of the jurisdiction which it claimed will appear from a list of the cases which, during this period, were brought before the court.[7] It

[1] 4, 5 Will. IV. c. 36 § 22.
[2] 7, 8 Vict. c. 2.
[3] 24, 25 Vict. c. 96 § 115; c. 97 § 72; c. 98 § 50; c. 99 § 36; c. 100 § 68.
[4] They deal with crimes committed on British ships or by British seamen. 17, 18 Vict. c. 104 § 267; 18, 19 Vict. c. 91 § 21; 57, 58 Vict. c. 60 §§ 686, 687.
[5] (1877) L.R. 2 Ex Div. 63, 202.
[6] Goodwin v. Robarts (1875) L.R. 10 Ex. 337; below 336, 337.
[7] Select Pleas of the Admiralty (S.S.) i lxv-lxxi. Cp. Malynes, Lex Mercatoria, 303, 304 (Pt. III. c. xiv).

practically comprised all mercantile and shipping cases. "All contracts made abroad, bills of exchange (which at this period were for the most part drawn or payable abroad), commercial agencies abroad, charter parties, insurance, average, freight, non-delivery of, or damage to, cargo, negligent navigation by masters, mariners, or pilots, breach of warranty of seaworthiness, and other provisions contained in charter parties; in short, every kind of shipping business was dealt with by the Admiralty court."[1] The Admiralty court was, in fact, regarded as one of the recognised tribunals of the Law Merchant.[2] In addition, the court exercised jurisdiction over various torts committed on the sea, and in public rivers, over cases of collision, salvage, fishermen, harbours and rivers, and occasionally over matters transacted abroad, but otherwise outside the scope of Admiralty jurisdiction.[3]

We have seen that during Elizabeth's reign the Common Law Courts began their attack upon the Chancery and the Council. It was not to be expected that they would tamely acquiesce in the encroachments of the Admiralty. Moreover, as we have seen, they were able to base their attack upon a statutory basis.

The Common Law Courts had issued writs of prohibition, based upon these statutes, from an early period. It is probable, however, that during the earlier part of the Tudor period the statutes had been largely disregarded;[4] and, as we have seen, the aid of the legislature had even been invoked on behalf of the Admiralty.[5] The Admiralty, also, had sometimes assumed the offensive, by means of a process of contempt, taken against those who brought proceedings upon maritime causes in another court.[6] It would appear that when the Common Law Courts resumed their efforts against the Admiralty, they at first had recourse to writs of supersedeas and certiorari issuing from the Chancery. But such applications to the Chancellor often left the Admiralty with the disputed jurisdiction. It was seen that writs of

[1] Select Pleas of the Admiralty (S.S.) i lxvii.

[2] Malynes, Pt. III. c. xiv.

[3] Select Pleas of the Admiralty (S.S.) i lxx. In the 16th century "even marriage contracts and wills made abroad are occasionally met with as the subject of suits in Admiralty."

[4] Above 318.

[5] 32 Henry VIII. c. 14 gave the court a certain jurisdiction in cases concerning charter parties and freight.

[6] Select Pleas of the Admiralty (S.S.) i lxviii, 78. On proof of the facts the party in contempt was arrested.

prohibition were the most effective instrument of attack or defence which the Common Law Courts possessed.[1]

In 1575 a provisional agreement was arrived at. But, after 1606, when Coke was raised to the Bench, the agreement was repudiated.[2] Coke, as Buller, J., once said, "seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."[3] He denied that the court was a court of record. He denied it the necessary power to take stipulations for appearance, and performance of the acts and judgments of the court. He denied that it had any jurisdiction over contracts made on land, either in this country, or abroad, whether or no they were to be performed upon the sea; and similarly he denied its jurisdiction over offences committed on land, either in this country, or abroad.[4] In support of his positions he did not hesitate to cite precedents which were far from deciding what he stated that they did decide.[5] It is fairly certain that the earlier prohibitions were all founded upon the exercise by the Admiralty of jurisdiction within the bodies of counties. The common law had not in the past claimed jurisdiction over contracts made or offences committed abroad, and probably not over contracts made and offences committed in ports intra fluxum et refluxum maris.[6] Such jurisdiction was now coveted. By supposing these contracts or offences to have been made or committed in England the Common Law Courts assumed jurisdiction;[7]

[1] Select Pleas of the Admiralty (S.S.) ii xli. For a list of Prohibitions, see ibid i lxxiii-lxxviii; ii xli-lvii; 4th Instit. 137-142; Prynne, Animadversions, 75-77. For a specimen of the writ, see App. XII. A 2.

[2] Select Pleas of the Admiralty (S.S.) ii xiv; Coke, 4th Instit. 136; Zouch, Jurisdiction of the Admiralty Asserted, Assertion v.

[3] Smart v. Wolff (1789) 3 T.R. 348. Lord Holt said (1 Ld. Raym. 398) that, "heretofore the common law was too severe against the Admiral." Prynne 103.

[4] 4th Instit. 136-138; Thomlinson's case (1605) 12 Co. Rep. 104; 2 Brownlow 16, 17 (1611).

[5] Prynne, Animadversions, 75-77; De Lovio v. Boit (1815) 2 Gall 407-418 (Story, J.).

[6] De Lovio v. Boit, at pp. 400-405; Y.B. 13 Hy. IV. Mich. pl. 10. Cp. F.N.B. 114, an English merchant's goods were spoiled by a merchant stranger beyond the sea. A writ was sent to the mayor of the town, in which other merchant strangers of the same nation were resident, directed against them; "but it seemeth that the English merchant shall not have such writ, for any debt due to him by contract from a Merchant Stranger, upon a contract made beyond the seas, if the merchant do come to England, or his goods—*Quare tamen* thereof." Prynne, Animadversions, 84, referring to those cases says, "neither Statham, Fitzherbert, or Brook in their Abridgments, Titles Prohibition, nor any of our Year Books Abridged by them, nor yet Mr Crompton in his Jurisdiction of Courts, nor yet judge Crook's nor serjeant Moore's reports, or Hughes or serjeant Rolle, their late Abridgments cite any such precedents before 7 Jac. or King Charles his reign." Life of Sir Leoline Jenkins, Wynne, i lxxix.

[7] Bl. Comm. iii 107.

and thus by a "new strange poetical fiction," and by the help of "imaginary sign-posts in Cheapside"[1] they endeavoured to capture jurisdiction over the growing commercial business of the country. The other common law judges followed Coke's lead. It was not of course to be expected that all the cases, decided at a time when the Common Law Courts were engaged upon a systematic series of encroachments, should be consistent.[2] But it is clear that they were all tending in one direction, regardless of the fact that the procedure of the Common Law Courts, and the law which they applied, were far less fitted than that of the Admiralty, to deal with the cases over which they claimed jurisdiction.

The merchants keenly felt the ill effects of these attacks made by the Common Law Courts. A conflict of jurisdiction must always give advantages to the unscrupulous litigant. It was clear that the Admiralty process was more speedy, and therefore more fit to deal with the cases of merchants and mariners. "Not one cause in ten comes before that court but some of the parties or witnesses in it are pressing to go to sea with the next tide."[3] The Admiralty could issue commissions to examine witnesses abroad, and it could examine the parties themselves. "The merchant if he can avoid the Admiralty, where he must answer upon oath, and proof may be made by commission, thinks himself secure from any danger at the common law."[4] The Admiralty could arrest the ship, and thus give far more effective security to those who had been employed upon it. The Admiralty could allow all the mariners to sue together for their wages, whereas the Common Law Courts insisted upon separate actions. The judges of the court of Admiralty, being civilians, were far more likely to be able to understand contracts made abroad with reference to the civil law.[5] Two

[1] Prynne, Animadversions, 95, 97.

[2] Sir R. Buckley's case (1590) 2 Leo. 182, agreement made in England for assistance at sea in taking a prize; Admiralty jurisdiction seems to be recognised. Tucker v. Cappes and Jones (1625) 2 Rolle 497, suit on a contract made in Virginia; Prohibition refused; it was said that the Admiralty had jurisdiction over things done in foreign parts, that foreign contracts were governed by the civil law, and that it was not reasonable that the common law should judge of them. Ambassador of King of Spain v. Joliff and others, Hob. 78, 79, "the Admiralty of England can hold no plea of any contract but such as ariseth upon the sea: no, though it arise upon any continent, port, or haven in the world out of the king's dominions. . . . The Courts of Common Law have unlimited power in causes transitory." Coke said, 2 Brownlow 17 (1611), that if a question of civil law arose the judges could consult with the civilians. De Lovio v. Boit 2 Gall 422.

[3] Life of Sir Leoline Jenkins, Wynne, i lxxxii.

[4] Zouch, Jurisdiction, etc., 130.

[5] Life of Jenkins i lxxvii, lxxxiii Zouch 129 130.

consultation was, I could overhear them, how to proceed with the most solemnity, and spend time, there being only two businesses to do, which of themselves could not spend much time."

It is quite clear that the court of Admiralty had on its side not only historical truth, but also substantial convenience. Prynne, Zouch, and Jenkins prove clearly both these facts. It is clear that the opposition of Coke and the common lawyers was unscrupulous. But it is clear that the common law had, after the Great Rebellion, gained the upper hand. And, from the point of view of the common law, the attack had been skilfully directed upon a position which it was worth much to secure; for the prize was nothing less than jurisdiction in all the commercial causes of a country the commerce of which was then rapidly expanding. Its commerce was in the future destined to expand beyond the most sanguine dreams of the 17th century. Coke could not foresee this. But he worshipped the common law; and he rendered it by no means the least of his many valuable services when he directed, and perhaps even misdirected, his stores of technical learning to secure for it this new field. To the litigant his action meant much inconvenience. To the commercial law of this country it meant a slower development.[1] But to the common law it meant a capacity for expansion, and a continued supremacy over the law of the future, which consolidated the victories won in the political contests of the 17th century. If Lord Mansfield is to be credited with the honourable title of the founder of the commercial law of this country, it must be allowed that Coke gave to the founder of that law his opportunity.[2]

Modern legislation has restored to the court of Admiralty

[1] Select Pleas of the Admiralty (S.S.) ii lxxx, "Many points of maritime law that were afterwards painfully elaborated by the common lawyers had for at least a century been familiar to the civilians," e.g. the liability of a carrier for loss by thieves was discussed at Westminster in 1671. It had been settled in the Admiralty as early as 1640. We can say the same as to many questions relating to Bills of Exchange, Bills of Lading, General Average, and Insurance. The common law followed the Admiralty "with tardy steps, perhaps unconsciously, certainly without acknowledgement."

[2] It is curious to note that a similar jealousy between the common law and the Admiralty manifested itself in the United States. The Massachusetts House of Representatives, just before the Revolution, resolved that, "the extension of the powers of the court of Admiralty within this province is a most violent infraction of the right of trial by juries," Williams and Bruce 5 n. k. Cp. Ramsay v. Allegre (1827) 12 Wheaton 611. As Roger North says "it is the foible of all judicatures to value their own justice and pretend that there is none so exquisite as theirs; while, at the bottom, it is the profits accruing that sanctify any court's authority."

many of the powers, and much of the jurisdiction of which it had been deprived in the 17th century.[1] It has been restored, as we have seen, to its ancient position of a court of record; and its judge has been given the powers possessed by the judges of the superior Courts of Common Law. It has been given jurisdiction in cases of salvage, bottomry, damage, towage, goods supplied to foreign ships, building, equipping, and repairing ships, disputes between co-owners. In addition, it has been given a new jurisdiction in the case of booty of war, if the crown sees fit to refer any such question to it, and a new jurisdiction under the Foreign Enlistment Act.[2] But the contests of the 17th century have left their mark upon the law administered by the court. The Common Law Courts often came to decisions, similar to those which the Admiralty had already given, upon the principles of the civil law. But the decisions, though the same in substance, were the decisions of English courts and enunciated rules of English law. The law administered by the court of Admiralty possesses, it is true, affinities with the maritime law of foreign countries. The law of Oleron, and other maritime codes, may still be usefully cited in English courts. But Admiralty law has lost the international character which it once possessed. It is essentially English law. "The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English maritime law."[3] "Neither the laws of the Rhodians, nor of Oleron, nor of Wisby, nor of the Hanse Towns, are of themselves any part of the Admiralty law of England. . . . But they contain many principles and statements of marine practice, which, together with principles found in the Digest, and in the French, and other ordinances, were used by the judges of the English Court of Admiralty, when they were moulding and reducing to form the principles and practice of their Court."[4] These statements would not have been made by the judges of the Court in the 16th, or even in the 17th centuries. The contact with, and the control exercised by the Courts of Common Law, have effected in a similar way both the civil and the criminal jurisdiction of the court.

[1] 3, 4 Vict. c. 65; 13, 14 Vict. c. 26; 24 Vict. c. 10.
[2] 3, 4 Vict. c. 65 § 22; 33, 34 Vict. c. 90 § 19.
[3] The Gaetano and Maria (1882) L.R. 7 P.D. at p. 143.
[4] The Gas Float Whitton, No. 2, L.R. 1896, P. at pp. 47, 48.

(*c*) *Admiralty Droits.*

The crown had originally certain rights to property found upon the sea, or stranded upon the shore.[1] The chief kinds of property to which the crown was thus entitled were, great fish (such as whales or porpoises),[2] deodands,[3] wreck of the sea, flotsam, jetsam, and lagon,[4] ships or goods of the enemy found in English ports, or captured by uncommissioned vessels, and goods taken or retaken from pirates.[5]

In early days, before the rise of the court of Admiralty, many of these droits were granted to the lords of manors, or to the towns which possessed Admiralty jurisdiction. Yarmouth had such rights.[6] In 1829 Dunwich and Southwold spent £1000 to determine the question whether a puncheon of whisky, taken up in the sea, was within the jurisdiction of one town or the other.[7] The Lord Warden of the Cinque Ports and the Ports themselves shared these droits between them.[8] In 1836 there was ligitation between the crown, and the owner of the manor and castle of Corfe and the Isle of Purbeck, as to the right to 49 casks of brandy.[9] If not so granted out, they were dealt with by the Common Law Courts or by special commissioners.[10]

After the rise of the court of Admiralty the Lord High Admiral becomes entitled to these droits by royal grant. At the end of the 14th and the beginning of the 15th century it would appear that he shared them with the crown.[11] From the reign of Henry VI. it would appear that they were generally granted to him. "The Admiral's Patents of the

[1] Stat. Prærogativa Regis (17 Ed. II. St. 1 c. xi). On the whole subject see L.Q.R. xv 353.

[2] Lord Warden of Cinque Ports v. The King (1831) 2 Hagg. Adm. 438.

[3] I.e. a thing causing the death of a man, Stephen, H.C.L. iii 77, 78; Holmes, Common Law 24-26; Select Pleas of the Admiralty ii xxvi, xxvii. They were abolished 9, 10 Vict. c. 62.

[4] "That nothing shall be said to be wreccum maris but such goods only which are cast or left on the land by the sea. . . . Flotsam is when a ship is sunk or otherwise perished and the goods float on the sea. Jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan (vel potius Ligan) is where the goods which are so cast into the sea, and afterwards the ship perishes, and such goods are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork . . . and none of these goods are called wrecks so long as they remain in or upon the sea, Sir Henry Constable's case (1601) 5 Co. Rep. 106.

[5] Select Pleas of the Admiralty ii xxxix.

[6] Ibid xxii [7] Ibid. [8] Ibid xxiii.

[9] The King v. 49 Casks of Brandy 3 Hagg. Adm. 257; 5 Co. Rep. 107 b it is said that "those of the west country prescribe to have wreck in the sea so far as they may see a Humber Barrel." [10] Select Pleas of the Admiralty (S.S.) i xli.

[11] Black Book of the Admiralty (R.S.) i 150; Select Pleas of the Admiralty ii xxiv.

sixteenth and following centuries contain express grants of royal fish, wrecks, waifs, flotsam, jetsam, and lagon, as well as many other perquisites connected with the sea and the sea-shore."[1] In Anne's reign, George Duke of Denmark, the Lord High Admiral, surrendered his droits during the war for a fixed annual sum. The office was in commission after his death, except for a short time, when it was held by George Duke of Clarence, afterwards William IV. The droits during this period were always reserved to the crown, but in terms which showed that they had been previously annexed to the office of Admiral.[2]

The right to droits carried with it a certain jurisdiction. Inquisitions were held into these droits at the ports,[3] or the Vice-Admirals or droit gatherers reported them to the Admiral.[4] The large terms of the Admiral's Patents incited them, or their grantees, to frequent litigation with private persons or other grantees of the crown.[5] If the property was unclaimed, it belonged to the Admiral or other person entitled, who might or might not reward the finder.[6] If a claimant appeared, he was entitled to restoration on proof of his claim, and the payment of a reasonable salvage. Such salvage was often allowed to the Vice-Admirals of the coast as a reward for taking possession of, and looking after, the property.[7]

The Admiralty droits, where the right has not been granted to other persons, are now transferred to the consolidated fund.[8] But it is provided that the crown may reward the finder. In 1854 they were put under the control of the Board of Trade.[9] In 1894 the method of dealing with wreck, flotsam, jetsam, and lagon found within British jurisdiction, was regulated by the Merchant Shipping Act.[10]

(2) Prize jurisdiction.

The term Prize is applied to the property of a belligerent seized at sea. Prizes can as a rule only be made by some

[1] Select Pleas of the Admiralty ii xxv.

[2] The King v. 49 Casks of Brandy 3 Hagg. Adm. at pp. 280, 281. "During the last French war the sums raised by droits was very large. Sums of £100,000, £190,000, and £58,360 are mentioned as having been paid to members of the royal family; the last sum is stated to have been paid out on account of the building, etc., of the Pavilion at Brighton," Select Pleas of the Admiralty ii xxxix.

[3] Select Pleas of the Admiralty ii xxvii-xxxii. [4] Ibid xxxvii.

[5] Ibid xviii, xix, xxii. In 1619 there was a dispute between the Lord Warden and the Admiral as to wrecks in the Goodwins. In 1632 there is a report to the Admiral on the encroachments of Lords of Manors. [6] Ibid xxxviii.

[7] Ibid xxxvii. As to wreck see ibid xxxix-xli; Hamilton v. Davis (1771) 5 Burr. 2732. [8] 1 Will. IV. c. 25; 1, 2 Vict. c. 2.

[9] 17, 18 Vict. c. 120 § 10. [10] 57, 58 Vict. c. 60 §§ 510-529.

vessel acting under the authority of the government.[1] It is clear that many complicated questions must arise as to the ownership of the ships or goods so captured. Such questions tended to become more complicated with the growth, during the 18th century, of that part of international law which relates to the rights and duties of neutrals. Lord Stowell, by his decisions in the many cases arising out of the wars at the end of the 18th and the beginning of the 19th century, settled the principles of prize jurisdiction of the Admiralty, as he settled the principles of the instance jurisdiction of the court.

From a very early period jurisdiction over prize was vested in the Admiral or the Council. It is clear that the Admiral had such jurisdiction in 1357.[2] Special provisions with regard to the exercise of the jurisdiction were often made by treaties with foreign sovereigns. In 1498 a treaty between Henry VII. and Louis XII. stipulates that mariners shall give notice to the Admiral of any spoil which they have taken, and that they are not to dispose of it until the Admiral has adjudged it to be lawful prize.[3] We can see that, from the 16th century, the prize jurisdiction of the court is beginning to be regarded as distinct from the instance jurisdiction.[4] Captors sailing under commissions granted by allies of England, as well as captors sailing under English commissions, resorted to the Admiralty court. "These cases frequently resolved themselves into suits between the respective Ambassadors of the powers to which the captor and prize belonged."[5] Prohibitions were not as a rule issued in prize cases.[6] Shortly after the Restoration the court held distinct sittings for prize business, and the records of such business were kept distinct. It became the custom to issue special commissions to the Admiral at the beginning of a war, requiring the judge of his court to hear prize cases.[7] The ordinary commission did not

[1] Pitt-Cobbett, Leading Cases in International Law (Ed. 1892) 205. Prizes can only be made by private vessels if they have been attacked in the first instance, ibid 211.

[2] Rhymer, Fœdera, vi. 14, 15, a letter to the King of Portugal stating that the Admiral had rightly condemned goods of his subjects captured by the French, and taken in French ships.

[3] Ibid xii 690-694; xiv 147-151; cp. a case before the Council (1589) cited Malynes, Lex Mercatoria, 108, 109.

[4] Select Pleas of the Admiralty ii xvii, xviii.

[5] Select Pleas of the Admiralty ii xvii, 170.

[6] Lindo v. Rodney (1781) 2 Dougl. 613, 618, 619. In his judgment Ld. Mansfield gives a complete history of the Prize jurisdiction. Cp. Select Pleas of the Admiralty ii lxxix.

[7] Lindo v. Rodney 614; re Banda and Kirwee Booty (1866) L.R. 1 A and E 129; 13 Car. II. c. 9; 22, 23 Car. II. c. 11; 6 Anne c. 13.

mention this jurisdiction.[1] The prize court thus became a court almost entirely distinct from the instance court. Lord Mansfield could say in 1781 that, "the whole system of litigation and jurisprudence in the prize court is peculiar to itself: it is no more like the court of Admiralty than it is to any court in Westminster Hall."[2] The Naval Prize Act of 1864, passed to enact permanently the provisions before usually made at the beginning of a war, gives to the court of Admiralty the jurisdiction of a prize court throughout His Majesty's dominions.[3] This jurisdiction is now exercised by the Probate, Divorce, and Admiralty division of the High Court.[4] The appeal from the prize court was to the Council,[5] and, after 1833, to the Judicial Committee of the Council. We shall see that appeals from the instance court now go to the House of Lords. Appeals from the prize court still go to the Council.[6]

It was in fact inevitable that the distinction between the prize and the instance business of the Admiralty should grow more definite with the growing definiteness of the principles of International Law on the one side, and the principles of Admiralty Law as administered in English courts on the other. The court of Admiralty administers, as we have seen, English Admiralty law. Though for historical reasons it resembles in general outline the maritime law of Europe, it is essentially English law.[7] The two greatest judges who have sat in a prize court have laid it down that a prize court administers international law. Lord Mansfield said,[8] "by the law of nations and treaties every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every country sues in these courts of the others, which are all governed by the same law equally known to each." Lord Stowell said in the case of *the Recovery*,[9] "It is to be recollected that this is a court of the law of nations, though sitting here under the authority of the King

[1] Possibly the jurisdiction was originally regarded as inherent in the court. In 1793 a claim to this effect was put forward by the Admiralty court of Ireland. It is said to have been the opinion of Sir W. Wynne that the Admiralty of Scotland had a similar jurisdiction.

[2] Lindo v. Rodney 614. [3] 27, 28 Vict. c. 25. [4] 54, 55 Vict. c. 53 § 4.

[5] Bl. Comm. iii 69, 70; 3, 4 Will. IV. c. 41 § 2.

[6] 54, 55 Vict. c. 53 § 4. 3. [7] Above 327.

[8] Lindo v. Rodney 616. [9] 6 C. Rob. 348, 349 (1807).

"approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any prince"; and, "the said customary law of merchants hath a peculiar prerogative above all other customs, for that the same is observed in all places."[1] "That commonwealth of merchants," says Davies,[2] "hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of all nations do take special knowledge." Davies, however, recognised that it was only the foreign trade of the country that was now ruled by this special law. "Merchandizes that cross the seas are goods of another nature, quality, and consideration than other goods and chattels, which are possessed within the realm, and do not cross the seas."[3]

It is clear from these writers that specific differences between the Law Merchant and the common law could still be pointed out. There was no survivorship in the case of merchants who were joint tenants. Wager of law was unknown among them. Bills of exchange, policies of assurance, assignations of debts were all unknown to the common law.[4]

But by the end of the 17th century this Law Merchant was being gradually absorbed into the general legal system of the country. As in the case of the internal trade, so in the case of the foreign trade, the older mercantile courts had ceased to exist. Jurisdiction was therefore assumed by the ordinary courts of law and equity.

We have seen that in the Middle Ages the courts of the Staple were the chief courts which regulated the dealings of foreign merchants. Malynes says, "our staple of wools is now out of use, and staple towns are all, as it were, incorporated into London."[5] It is clear from his account of the courts which administer the law merchant that there was in England, in the latter part of the 17th century, no effective court specially set apart for the merchants.[6] In the 16th and earlier 17th centuries the Council and the court of Admiralty had supplied the place of such a court. But the jurisdiction of the Council in England had come to an end in

[1] Lex Mercatoria 3.

[2] The Question concerning Impositions (Ed. 1656) 10. Davies was Attorney-General to James I.

[3] Ibid 11, 12 citing Y.B. 13 Ed. IV. pl. 9. He said that he had wondered why there were so few cases in the books concerning merchants. "But now the reason thereof is apparent, for the common law of the land doth leave these cases to be ruled by another law, namely, the Law Merchant, which is a branch of the law of nations," 16, 17.

[4] Davies 12-15; Malynes 73-76; East India Company v. Sandys (1684) 10 S.T. at p. 524. [5] Lex Mercatoria 155. [6] Ibid, Pt. III. chaps. xiv-xx.

1640; and we have seen that the Courts of Common Law had deprived the Admiralty of the greater part of its jurisdiction over mercantile causes. In 1601[1] a court had been established in London consisting of the recorder, two doctors of the civil law, two common lawyers, and eight "grave and discreet" merchants, to hear insurance cases, "in a brief and summary course, as to their discretion shall seem meet, without formalities of pleadings or proceedings." But it had been held, in 1658, that proceedings before this court were no bar to an action at law;[2] and it was constantly hampered by prohibitions.[3] Merchants were therefore driven, either to arbitration,[4] or to the courts of law, or, in matters which involved the taking of accounts, to the court of Chancery.[5] Reported cases of the 17th century illustrate the effect of this upon the Law Merchant. They show that mercantile law is ceasing to be the law of a class, and that it is becoming part of the general law of the land. The earlier cases upon Bills of Exchange treat them as ruled by special customs, applicable only to merchants, which it is necessary to prove.[6] In 1699 Treby, C.J., said that Bills of Exchange at first extended only to merchant strangers trading with English merchants; afterwards to inland Bills between merchants trading with one another in England; and lastly to all persons whether traders or not; and that there was now no need to allege and prove the custom.[7]

The process was assisted, after the Revolution, by the greater freedom allowed to foreign trade. In the 16th and 17th centuries foreign trade was in the hands of companies incorporated by the crown with exclusive rights to trade.[8]

[1] 43 Eliza. c. 12. Reinacted and amended 13, 14 Car. II. c. 23.

[2] Came v. Moye 2 Sid. 121.

[3] It was said in 1787 that, from the reign of Elizabeth to 1765, when Ld. Mansfield became C.J., it had not heard 60 cases on marine insurance, Smith, Merc. Law, lxix.

[4] Malynes, Pt. III. c. xv; cp. Dasent xxii *xxxiv*; xxiii *xlvi*.

[5] "Merchants' causes are properly to be determined by the Chancery, and ought to be done with great expedition; but it falleth out otherwise, because they are by commission commonly referred to merchants to make report of the state thereof unto the Lord Chancellor," Malynes 319. There is an affinity between the jus gentium of the merchants and English equity, as there was between the Roman jus gentium and jus naturale, Buller J. Lickbarrow v. Mason (1793) 1 S.L.C. 709.

[6] Oaste v. Taylor (1613) Cro. Jac. 306, the custom of the merchants is fully set out. Similarly in Woodward v. Rowe (1669) 2 Keb. 105. In Witherley v. Sarsfield, Shower 127 (1689) Holt said that the act of drawing a bill made a man a trader for this purpose.

[7] Bromwich v. Lloyd 2 Lut. 1582, 1585. Cp. Chalmers, Bills of Exchange, xlv-xlvii, as to the result of this upon the English law of Bills of Exchange.

[8] Gross, Gild Merchant, i 140-156; Hall, Customs Revenue, i 50-54; L.Q.R. xvi 54.

The validity of such grants was upheld, in 1684, in the *East India Company v. Sandys*.[1] It is clear that such an organization of trade will tend to the settlement of disputes by the arbitration of the governing body of the company. But, in 1693, trade had been to a large extent freed by a resolution of Parliament, "that it is the right of all Englishmen to trade to the East Indies, or any part of the world, unless prohibited by Act of Parliament."[2] It was a natural, though perhaps an indirect result, of the Great Rebellion and the Revolution that the ordinary courts should thus absorb jurisdiction over mercantile cases. The fact that the Law Merchant was not English law, but jus gentium, had been used to prove that the crown had such large powers over trade, that it could impose impositions, or create a monopoly.[3] It was clear that the Law Merchant must be administered in the ordinary courts of law or equity if it was to be made to harmonize with the now established principles of English law.

The complete incorporation of the Law Merchant with the common law was not effected till the time of Lord Mansfield. Up to his time mercantile business had been divided between the courts of law and equity. No attempt had been made to reduce it to a system.[4] This Lord Mansfield accomplished, and this entitles him to the fame of being "the founder of the commercial law of this country."[5] The Law Merchant has ceased to be a separate body of law administered by separate courts: "it is neither more nor less

[1] 10 S.T. 371. Cp. Company of Merchant Adventurers v. Rebow (1687) 3 Mod. Rep. 126, 128.

[2] Newcastle Merchant Adventurers (Surtees Soc.) i xli-xliv.

[3] This is the argument of Davies' work upon impositions, chap. vi. "Forasmuch as the general law of nations which is and ought to be law in all Kingdoms, and the Law Merchant which is also a branch of that law, and likewise the Imperiall or Roman law, have ever been admitted by the kings and people of England in causes concerning Merchants and Merchandize. . . . Why should not this question of Impositions be examined and decided by the rules of those laws, so far forth as the same doth concern Merchants or Merchandizes, as well as by the rules of our Common Law of England?" Cp. Bate's case (1606) 2 S.T. at p. 389.

[4] Campbell, Lives of the Chief Justices, ii 402, 403.

[5] "We find in *Snee v. Prescott* that Ld. Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. . . . I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country," Buller J. Lickbarrow v. Mason (1793) 1 S.L.C. 674, 685.

than the usages of merchants and traders . . . ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law."[1]

(2) The Court of the Constable and the Marshal.

At all periods armies need to be governed by laws other than those which govern the rest of the community. These laws were administered in the Middle Ages by the Constable and Marshal's court.

"Always," says Hale,[2] "preparatory to an actual war, the kings of the realm, by advice of the Constable and Marshal, were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law. We have extant in the Black Book of the Admiralty and elsewhere several examples of such military laws." The maintenance, then, of the rules to be observed in the army was the main part of the jurisdiction of the court. The court possessed also certain other allied branches of jurisdiction. It took cognisance of all contracts relating to "deeds of arms," and all things "that touch war within the realm which cannot be determined nor discussed by the common law."[3] Instances of such matters would be agreements to hire soldiers, or questions of prisoners or prize.[4] It took cognisance, also, of matters of heraldry, and of words spoken to the disparagement of men of honour.[5]

It is clear from statutes of Richard II. and Henry IV.'s reign that the legislature desired to prevent the court from encroaching upon the province of the common law.[6] These statutes limited its jurisdiction in much the same way as similar statutes limited the jurisdiction of the court of Admiralty.

[1] Goodwin v. Robarts (1875) L.R. 10 Ex. 337, 346; cp. Brandao v. Barnett (1846) 12 Cl. and Fin. 787, and Edelstein v. Schuler and Co. L.R. (1902) 2 K.B. 144, 154.

[2] Common Law 42. For an account of these rules see Cockburn's charge to the Grand Jury in Reg. v. Nelson and Brand (Special Report 89-91) and Black Book of the Admiralty (R.S.) i 282-299, 453-472.

[3] 13 Rich. II. St. 1 c. 2; Black Book of the Admiralty i 281. "The office of the Conestable and Mareschalle in the time of werre is to punysh all manner of men that breken the statutes . . . by the king made to be keped in the oost." . . . They also have "knowleche upon all maner crymes, contracts, pleets, querelle, trespas, injuries, and offenses don beyonde the see in tyme of werre betwene souldeour and souldeour, bytwene merchaunts . . . and artificers necessary to the oost."

[4] Knapp 149-152 and note, citing Hale's M.S. treatise on the prerogative.

[5] Rushworth, Pt. 2 vol. ii 1054, 1055; Oldis v. Dommille (1695) Shower 58.

[6] 8 Rich. II. c. 5; 13 Rich. II. St. 1 c. 2; 1 Henry IV. c. 14.

Over matters relating to war done outside the realm the court had an unlimited jurisdiction, civil and criminal.[1] Within the realm the court probably only had jurisdiction over alien enemies,[2] in matters arising out of some past war, such as prisoners or prize, or in cases where a war was actually proceeding.[3] Probably these limitations were strictly observed in the Middle Ages. In 1394 the court held that it had no jurisdiction to try an action for breach of contract made outside the realm, but unconnected with any military operations.[4]

But just as the Tudors extended the jurisdiction of the court of Admiralty without much regard for earlier statutes or precedents, so they extended the jurisdiction of the court of the Constable and Marshal. They made use of the obscurity of the law to assume the powers which they considered to be necessary for the maintenance of the peace. We have seen that the jurisdiction of the court within the realm was limited; but it was within the realm that the Tudors required its assistance. At a time when there was no standing army a jurisdiction over soldiers was capable of being confused with a jurisdiction over all citizens liable to serve as soldiers. On the principle that prevention is better than cure it was plausible to say that the jurisdiction of the court was legal, not only when war was actually proceeding, but also at a time of merely apprehended disturbance.[5]

That these extensions of the court's jurisdiction were regarded as illegal we can see from a case of Elizabeth's reign cited by Camden. The queen desired to proceed by martial law against a fanatic who had attacked Sir J. Hawkins. She was told that it was illegal to proceed "ex jure militari sive castrensi" unless it was a time of real disturbance.[6] Sir Thomas Smith was of the same opinion.[7] But, though illegal, these extensions of the court's jurisdiction

[1] Above 337 n. 2; Y.B. 13 Hy. IV. Mich. pl. 10; Y.B. 37 Hy VI. Pasch. pl. 8; Hearne, Curious Discourses (Ed. 1720) 259, 260; Hale, Common Law, 41 n. d.

[2] Perkin Warbeck's case, cited 7 Co. Rep. 6 b.

[3] Black Book of the Admiralty i 281, "Yf any of the personnes be oone [our own subject], and the other personne be a straunger, the connestable and mareschalle shall have knowlech in the said matere done in the werre beyonde the see, and of all manere dedes of armies here within the londe doone he hath congnoissaunce, and of the offenses doon beyonde the see he hath knowleche of here in the londe"; Knapp 149-152.

[4] Copyn v. Snoke, Select Pleas of the Admiralty (S.S.) ii lix.

[5] For an account of the commissions issued to the Constable in accordance with these ideas see Forsyth, Leading Cases, 553-555, and Hallam (C.H.) i 240-243.

[6] Camden, Annales s.a. 1573 (cited Prothero, Documents, etc., 176).

[7] Commonwealth, Bk. II. c. iv, cited L.Q.R. xviii 152, 153; cp. 12 Co. Rep. 12, 13.

do not seem to have excited much public feeling during the Tudor period.

Under the Stuarts the whole question of the extent and limitations of the jurisdiction was raised. The Petition of Right declared illegal these extensions of the court's jurisdiction.[1] It therefore condemned the view that this court had jurisdiction over civilians within the realm in time of peace. It was also clearly settled that it was not a time of war unless the king's courts were shut up, or unless the sheriff could not execute the king's writ.[2] The views acted upon by the Tudors were, in spite of the Petition of Right, declared to be good law by the majority of the judges in the *Case of Ship money*.[3] But the victory of the Parliament restored the reasonable construction of the Petition of Right. The common law triumphed over the court of the Constable and the Marshal as it triumphed over the court of Admiralty and the Council.

The Court was voted a grievance in 1640.[4] The office of Constable had ceased to be permanently filled in Henry VIII.'s reign.[5] It was discovered in Anne's reign that the absence of the Constable invalidated the proceedings of the court, and that it was not a court of record.[6] Its jurisdiction had become in fact confined to pedigrees, escutcheons, pennons, and coat-armour. The last case known to have been tried in it occurred in 1737.[7] So completely had it disappeared that even Lord Mansfield seems to have been ignorant of its ancient jurisdiction. In *Lindo v. Rodney*[8] he said, "As to plunder or booty in a mere continental land war . . . it has never been important enough to give rise to any question about it. There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom." We have seen that in the Middle Ages this was one of the branches of the court's jurisdiction.

The court ceased to exist because it was not needed. Jurisdiction over the army has passed to courts martial which were partly legalized, but chiefly created by the Mutiny Acts of the last two centuries. The effect of the Petition of Right

[1] 3 Car. I. c. 1 §§ 6, 7, 9, 10; see L.Q.R. xviii 120.

[2] "If the Chancery and courts of Westminster be shut up . . . it is time of war, but if the courts be open it is otherwise; yet if war be in any part of the kingdom, that the sheriff cannot execute the king's writ, there is *Tempus belli*," Rushworth, Pt. 2 vol. ii App. 79, 81; Hale 1 P.C. 344.

[3] 3 S.T. at p. 1234.

[4] Rushworth, Pt. 2 vol. ii 1056.

[5] Hale, Common Law, 41.

[6] Chambers v. Jennings (1701) 7 Mod. 125.

[7] Sir H. Blount's case, 1 Atk. 296; Bl. Comm. iii. 103-106.

[8] (1782) 2 Dougl. at p. 614.

has been that which its framers designed. It has practically left jurisdiction over the ordinary citizen in times of riot or rebellion to the common law. At such times the common law lays it down that the right and the duty of the ordinary citizen is to protect life and prevent crime "by the immediate application of any amount of force which, under the circumstances, may be necessary";[1] and the rules of the common law have been found to be sufficient.[2] Just as the victory of the Common Law Courts over the Admiralty left them free to develop mercantile law upon their own lines, just as their victory over the Council stopped the growth of any system of administrative law, so their victory over the Constable and Marshal's court has left the case of riot or rebellion to the common law, and has caused the "state of siege"[3] to be practically unknown in England.

(3) The Courts of the Forest.

The Forests of the Middle Ages were governed by a law, and by courts, which were as distinct from the common law and its courts, as the law and courts of the merchants, or the church.[4]

Manwood[5] thus describes a forest. "A Forest is a certain territory of wooddy grounds and fruitful pastures, privileged for wild beasts and fowls of Forest, Chase and Warren, to rest and abide in, in the safe protection of the King, for his princely delight and pleasure, which territory of ground, so privileged, is meered and bounded by unremoveable marks, either known by matter of record, or else by prescription: and also replenished with wild beasts of Venery or Chase, and with great coverts of Vert, for the succour of the said wild beasts, to have their abode in: for the preservation and continuance of which said place, together with the Vert and Venison, there are certain particular laws, privileges and officers, belonging to the same, meet for that purpose, that are only proper unto a Forest and not to any other place." The forest therefore possesses peculiar officers, peculiar courts, and a peculiar law. It is from the point of view of these three peculiarities that it is interesting to the legal historian. We shall first describe the forest organization as it existed in

[1] Charge to the Grand Jury, Reg. v. Nelson and Brand 85.

[2] For a summary of the later history of Military and Martial Law see L.Q.R. xviii 119-132.

[3] Dicey, Law of the Constitution, 272-274.

[4] On the whole subject see an article in the *Edinburgh Review*, April 1902.

[5] Forest Laws (Ed. 1665) 40. The first edition was published 1598. Cp. Dialogus de Scaccario I. xii (Sel. Ch. 206).

the 13th century and then sketch the gradual decay of that organization.

*The organization of the forests in the 13th century.*

The forests were, before 1238, sometimes under the charge of several justices, but generally under one Chief Justice of the Forest. In 1238 they were divided into two provinces according as they lay to the north or south of the Trent. Over each forest a justice was appointed. They were responsible for the whole administration of the forests; and they were allowed, and in fact obliged to do their work by deputies, appointed sometimes by the crown sometimes by the justice.[1] By the end of the 14th century the office of justice had become a sinecure. Their deputies did the work. This included the holding of inquisitions as to the general state of the forests, and as to the expediency of royal grants, and the release on bail of prisoners accused of breaches of the forest laws.[2]

Over particular forests, or particular groups of forests, were officials generally termed Wardens. They were the executive officers of the crown, to whom the royal writs relating to the forest business were addressed. They attended the forest courts. In fact, their position with regard to the forests seems to have been somewhat analogous to the position of the sheriff with regard to the shire.[3]

In all the forests there were a varying number of officers (usually four) elected in the county court, and styled Verderers. Manwood says that they should be "gentlemen of good account, ability and living, and well learned in the laws of the forest." Their duty was to attend the forest courts. They were in immediate relation to the crown. Possibly they were regarded as a check upon the Warden, as the coroner was upon the sheriff.[4]

Under the Wardens were a varying number of officials styled Foresters. They did the work of a modern gamekeeper. In theory they should have been paid by the Wardens. In fact they often paid the Wardens to allow them to exercise an office which gave abundant opportunities for the oppression of the inhabitants of the forest.[5]

[1] 32 Henry VIII. c. 35 gave statutory validity to the practice.

[2] Select Pleas of the Forest (S.S.) xiv-xvi; Manwood 488, 489.

[3] Ibid xvi-xix. They are either appointed by letters patent and hold office during the king's pleasure, or they are hereditary wardens. They are sometimes called stewards, bailiffs, or chief foresters.

[4] Manwood 403-407; Coke, 4th Instit. 292, 293; Select Pleas xix, xx; F.N.B. 164 c.

[5] Manwood 428-439; Coke, 4th Instit. 293; Select Pleas xx-xxiv. There were several varieties. Manwood at p. 428 says, "Some such foresters are foresters in fee

In each forest there were usually four Agisters, whose duty it was to collect the money due for the agistment and pannage of cattle and pigs in the king's demesne forests.[1]

The king was not the absolute owner of all the lands in the forests. The owners of such lands could use them as they pleased, subject to the condition that they could do nothing which would interfere with the beasts of the forest. "In precise language, they could not make essart purpresture, or waste without the king's licence."[2] The owners of such lands appointed persons called Woodwards, whose duty it was to protect the property of their masters, and also to protect the king's venison. Their appointment must always have the sanction of the justice of the forest.[3]

Certain land once forming part of the forest, but disafforested in consequence of a perambulation to ascertain the boundaries of the forest, was under the control of officials called Rangers. We do not hear of them till the end of the 14th century.[4] Their duties were limited to these districts, outside the forest, known technically as purlieus. They are officials "of the forest, but not within the forest." Their office "doth chiefly consist in ranging and walking of the pourallées, and in safe conducting of the wild beasts, that they shall there find, into the forest again, and also in presenting of all offenders and unlawful hunters, and of their trespasses and offences, which they have done within the pourallées."[5]

Such were the chief officials of the forest. Their powers and jurisdiction were exercised in peculiar courts, the arrangement and procedure of which present certain features of resemblance both to the communal courts, and to the courts of the justices in eyre, as they existed in the 13th century.

(1) The Court of Swanimote. The word Swanimote has been applied to different courts at different periods in the history of the forest law. Originally it meant a court which, according to the Charter of the Forest, met three times a year, for the purpose of business connected with agistment, pan-

and have the same office to them and to their heirs, paying unto the king a certain fee farm or rent for the same . . . and there are some other foresters of the king that have their office but for term of their life only: and again there are some foresters of the king that have their office by letters patent from the king . . . durante bene placito only." [1] 4th Instit. 293; Select Pleas xxv.

[2] Select Pleas xxiv. An *essart* was the destruction of the forest and the reduction of it to a state of cultivation, Dialogus de Scaccario I. xiii (Sel. Ch. 206). Manwood at p. 154 says that it was "the greatest offence and trespass of all other." A *purpresture* means an encroachment on the forest, Dialogus II. x (Sel. Ch. 225); Dyer pl. 45 p. 240 b. *Waste* is when any tenants within the forest abused any rights they had, e.g. the right of lopping wood, Select Pleas lxxxiii. [3] Select Pleas xxiv, xxv. [4] Ibid xxv. [5] Manwood 396-398.

nage, and fawning.[1] It would appear that Manwood confused this court, held at these times, with the inquisitions, held to enquire into trespasses to vert and venison, to which the term Swanimote was often applied.[2]

(2) The Court of Attachment.[3] This was a court which was held every forty days by the verderers to view the attachments by the foresters for offences against the vert and the venison. The jurisdiction of the court was small. It could only take cognisance of small trespasses to the vert. Larger trespasses were duly enrolled and heard by the justices in eyre. In such cases the offender, if an inhabitant of the forest, found pledges to appear at the eyre; if not an inhabitant he was imprisoned till the eyre, or till released by the Chief Justice of the forest. But, according to statutes of Edward III. and Richard II.'s reigns, such imprisonment could only take place if a person had been duly presented by officers of the forest and other lawful men, or if he had been taken with the mainour.[4]

(3) Special and General Inquisitions.[5] According to the Consuetudines et assisa de foresta,[6] it was the duty of the foresters and verderers, with the assistance of the four neighbouring townships, to hold enquiry into all offences committed in the forest. A special inquisition was held whenever the commission of an offence was discovered; for instance, if a deer were found dead in the forest, or if greyhounds were found straying about the forest. The persons whom the townships presented as guilty were attached to appear before the justices in eyre. If the townships did not appear, or appeared and knew nothing of the facts, they were amerced at the eyre. In the reign of Edward I. these special inquisitions, held to enquire into particular offences, gave place to general inquisitions, held for the purpose of enquiring into any offences which had been committed over a certain district within a certain time. In a statute of 1306[7] they are called swanimotes, and the method of taking the inquisition is defined. They were always held before a deputy of the

[1] § 8 (Sel. Ch. 349); Select Pleas xxvii seqq.

[2] The term was so applied by the Ordinatio Forestæ 34 Ed. I. St. 5 c. 1; Manwood c. 23. At pp. 478-485 he gives a list of forty-five articles to be enquired into by the court. These clearly belong to the general inquisition, not to the Swanimote as defined by § 8 of the charter of 1217.

[3] Forest Charter (1217) (Sel. Ch. 349, 350) § 8; Manwood 401, 402, 443-450; Coke, 4th Instit. 289; Select Pleas xxx seqq. The ubiquitous word Swanimote is sometimes applied to this court, ibid xxxvi.

[4] 1 Ed. III. St. 1 c. 8; 7 Rich. II. c. 4.

[5] Select Pleas xxxvii-l.

[6] Printed at the end of Edward II.'s reign among the Statuta incerti Temporis.

[7] 34 Ed. I. St. 5 c. 1.

justice of the forest, most of the forest officials, and a jury. All offences against the forest law, or misdoings of officials could be presented at these inquisitions.[1]

(4) The Regard.[2] The Regard was an enquiry held, once every three years, by twelve knights chosen for the purpose. The subject matter of their enquiry was fixed in Henry III.'s reign. The most important articles of their enquiry related to essarts, purprestures, and waste. Persons who had newly essarted land, or who were guilty of making purprestures or waste, were dealt with by the justices in eyre. Other articles dealt with hawks and falcons, mines, harbours in the forest suitable for the export of timber, honey, underwood, the possessors of arrows, greyhounds, or other things likely to harm the deer.

(5) The Eyre.[3] Just as the whole administration of the county was reviewed by the justices in eyre,[4] so the justices in eyre of the forest reviewed the whole administration of the forests. Their court is sometimes called the court of Justice Seat.[5] The justices in eyre were appointed by the crown to hear the pleas of the forest over a certain defined county or collection of counties. Among them the justices of the forest were usually included. The sheriffs of each county were directed to summon by a fixed date all those holding land within the forest, the reeve and four men from each township within the forest, the foresters, verderers, regarders and agisters, with their attachments, regards and agistments. At the eyre all persons presented as guilty of breaches of the forest laws were amerced. The proceedings of the special and general inquisitions, and of the regard, all led up to the final amercement of the offender at the eyre. "By the laws of the Forest all the proceedings of those courts for the greatest offences done in the forest are as nothing until such time as they are presented to the Lord Justice in Eire of the Forest at the Justice Seat."[6] The Dialogus de Scaccario tells us that revenue from such sources was the most valuable part of the revenue from the forests.[7] "It was

[1] For an example of a general inquisition, see that of 1369, Select Pleas xlix; as to the articles of enquiry in the 16th century, Manwood 478-485.

[2] Select Pleas lxxv-lxxxvii. Coke, 4th Instit. 292, gives the articles. Manwood 408, 409. Cp. Fleta II. 41 "De veteris capitulis Forestæ; the first eleven are the chapters of the Regard.

[3] Select Pleas l-lxix. [4] Above 112-115.

[5] 4th Instit. 291, 292; Manwood 491-525.

[6] Manwood 505. Cp. p. 402, "Unto which court (the Justice Seat) the courts of Attachments and Swanimotes are but as it were two hands to deliver matters unto it, to receive judgments thereof from thence." Coke, 4th Instit. 290.

[7] II. xi (Sel. Ch. 232) Quod enim de forestis solvitur pene totum vel ejus maxima pars ex placitis et exactionibus provenit.

almost as much a financial assembly as a court of law. The records of its proceedings are memoranda of sums of money owing to the king rather than registers of process and judgments."[1] The searching nature of their enquiry into the forest administration is illustrated by the articles of the eyre, given by Fleta.[2] Probably the forest eyre was held, like the general eyre for the county, about once in seven years.[3] Coke[4] and Manwood,[5] however, state that, like the regard, it was sometimes held once in three years. However, it is certain that even in Edward I.'s reign they were held much more irregularly. In the 14th century and later, they tend to become more and more infrequent.

These peculiar courts administered the forest law, which was, in the 13th century, regarded as a body of law distinct from the common law.[6] Questions which fell within the scope of that law would not be discussed by the Courts of Common Law.[7] The jurisdiction of the forest courts could be pleaded in bar to proceedings at common law.[8] Several particulars are mentioned by Coke and Manwood in which the rules of the forest law were different from those of the common law.[9]

It is a common characteristic of mediæval times to find the various kinds of jurisdiction known to the law in private hands. Even the highly prized forest law is no exception to this rule. In two exceptional cases in the 13th century grants of the whole forest jurisdiction were made. In 1266-67, Henry III. granted these privileges to the Earl of Derby, and in 1285 Edward I. made a similar grant to his brother Edmund.[10] As a general rule, however, the effect of the grant of a forest was not to vest forest jurisdiction in the grantee, but to give him a "chase."[11] If any jurisdiction was

[1] Select Pleas lx.

[2] Fleta II. 41 caps. 12-51; Manwood 509-525. In his time they were 84 in number. [3] Select Pleas lvi, lvii. [4] 4th Instit. 291. [5] Manwood 411.

[6] Dialogus de Scaccario I. xi. (Sel. Ch. 205, 206). Sane forestarum ratio, pœna quoque vel absolutio delinquentium in eas, sive pecuniaria fuerit sive corporalis, seorsum ab aliis regni judiciis secernitur, et solius regis arbitrio vel cujuslibet familiaris ad hoc specialiter deputati subjicitur. Legibus quidem propriis substitit; quas non communi regni jure, sed voluntaria principum institutione subnixas dicunt. [7] Keilway 150 b. pl. 43 (citing a case of Edward III.'s reign).

[8] Manwood 490, 491 (citing two cases of Henry VII.'s reign).

[9] 4th Instit. 315, 317; Manwood 486.

[10] Select Pleas cxi, cxii; 4th Instit. 314. In 1615 the whole question of these grants was discussed in The King v. Briggs, 2 Buls. 295 (also reported 1 Rolle 112, 194). Dodderidge, J., said that James had made a similar grant to Prince Henry. Manwood 72-91.

[11] In the King v. Briggs Coke said, "It is a chase and not a forest being in the hands of a subject; a swanimote court a subject may have, but no subject may

intended to be conveyed it must be expressed in the grant. The result was that the forest organization and most of the forest law ceased to apply to the land so granted. The grantee had the right of arresting trespassers, if caught with the mainour, as the beasts were his by the law of the forest; and he could exercise any other jurisdiction specially granted to him.[1] In some places, for instance, the lords of chases held courts termed Swanimotes.[2]

The right to make a park was possessed by all owners of the soil; but a licence of the crown was required if the proposed park was in a forest, or so near a forest as to be a nuisance to it, by attracting away the beasts of the forest. The forest law did not apply to a park. The owner of a park could preserve the beasts therein, not because they were his, but because it was a trespass to enter his park.[3] Such trespasses were penalised by the legislature.[4] Usually the Common Law Courts took cognisance of them. Possibly in some cases they were dealt with in the manorial court.[5]

The right to a free warren was a right granted by the crown to take certain beasts *feræ naturæ* (other than beasts of the forest) on the demesne lands of the grantee, provided the lands were not within the bounds of a forest. In many cases the lord had a court in which trespasses upon this right were tried.[6]

The grant of these smaller franchises were no doubt either caused or suggested by the king's large control over the forests. The subsequent history of the forest law and of these smaller franchises is very different. While the forest law declined, these smaller franchises changed their shape, and were expanded into the Game Laws.

*The decay of the forest organization.*

When Manwood wrote his treatise on the forest laws in 1598 the forest organization was already in a state of decay. "The forest laws," he says, "are gone clean out of knowledge in most places in this land";[7] and they are "grown into contempt with many inhabitants in forests."[8] Several causes had contributed to bring about this result.

have a forest, because none can make a justice in eyre but the king." But in Jennings v. Rocke (1595) Palmer 93, 94, Popham had said that a subject might have a forest by special words of grant. At an earlier stage in the former case Bacon, the Atty.-General, had confessed judgment. Coke was evidently not sorry to have a chance of scoring off him. Manwood, 75, seems to take Popham's view.

[1] Select Pleas cxxii. [2] Ibid cxiv.

[3] Ibid cxv, cxvi, cxxii; Cro. Jac. 155 (1608) case of Leicester Forest.

[4] Below 350. [5] The Court Baron (S.S.) 34.

[6] Select Pleas cxxiii, cxxvii, cxxxix. [7] Preface. [8] At p. 71.

(1) The forest organization had never been popular with any class in the community. It was unpopular with the landowner because it fettered his rights over his land. It was unpopular with the farmer because the large powers of the forest officers led to much oppression.

The first cause for the unpopularity of the forests found expression in the demand for the limitation of the forest boundaries. These demands were granted in Magna Carta[1] and the Forest Charter of 1217. In 1218 perambulations of the forest were made by twelve knights in order to carry into effect the provisions of the Forest Charter. In 1219 and 1225 similar measures were taken. In 1227, when Henry came of age, he directed further perambulations with a view of again afforesting districts which had been wrongfully disafforested. This was made the subject of complaint in 1260. In 1277, 1298, and 1300 there were further perambulations.[2] The result of the last perambulations was extensive disafforestment. Subsequent statutes fixed the boundaries of the forest as so established.[3] As so established they remained during the 14th, 15th, and 16th centuries. When Henry VIII. wished to afforest the land round Hampton Court, he got statutory authority, and provided compensation for the tenants of the land.[4]

The second cause for the unpopularity of the forests also found expression in Magna Carta[5] and the Charter of the Forest.[6] The clauses of the charters show that the officers of the forest—especially the foresters—used their powers to oppress the dwellers in the forest. The same abuses appear in presentments made at the forest eyres,[7] and in several later statutes.[8] The Ordinatio Forestæ of 1306[9] explains that their misdeeds conduce, not merely to the oppression of the people, but to the damage of the crown. Some sentences taken from

[1] Charter of 1215 §§ 47, 48.

[2] Select Pleas xciii-cvii. An account of these perambulations is given in the King v. Inhabitants of Rodley (1667), Hardres 437, 438.

[3] 1 Ed. III. St. 2 c. 1

[4] 31 Henry VIII. c. 5; 4th Instit. 301.

[5] § 48. [6] §§ 7, 14, 16.

[7] Select Pleas 44-53, presentment at the Rutland Eyre of 1269 of the extortions of Peter de Neville and his foresters. At p. 50 it is presented that "the same Peter imprisoned Peter, the son of Constantine, for two days and two nights at Allexton, and bound him with iron chains on suspicion of having taken a certain rabbit in Eastwood; and the same Peter, the son of Constantine, gave two pence to the man of the aforesaid Peter de Neville, who had charge of him, to permit him to sit on a certain bench in the gaol of the same Peter, which is full of water at the bottom." Cp. 125-128.

[8] 1 Ed. III. St. 1 c. 8; 25 Ed. III. St. 5 c. 7; 7 Rich. II. c. 3; Manwood 432-439. [9] 34 Ed. I. St. 5.

a royal proclamation, inserted before the statute, will illustrate the nature of grievances which were felt all through the Middle Ages. "Non nunquam etenim fiunt accusatores de Foresta . . . non per legitimas inquisitiones proborum et legalium hominum patriæ precedentes, ut justitia requirit, sed ad dictum unius vel forsan duorum de forestariis, aut ad dictum unius vel forsan duorum de viridariis, qui ex odio aut alias maliciose, ut ab aliquo pecuniam extorqueant, quenquam accusant vel indictant, et exinde sequuntur attachiamenta gravia, et punitur innocens, quem nulla omnino culpa seu delictum constringit. Opprimitur etiam populus, præ multitudine forestariorum et aliorum ministrorum, quos, cum non habeant unde abunde vivant, per patriam, forestæ adjacentem vivere oportebit eosdem, et quod est deterius, pro jure officii sui vendicant, ut sic vivant isti nichilominus pro suis victualibus quibus egent, boscum suæ custodiæ . . . deputatum, et feras in eisdem existentes, vendendo, donando, et multipliciter minuendo, ac minui permittendo, successivis dierum processibus destruunt et adnichilant, ad nostrum et heredum nostrorum intolerabile detrimentum." Statutes attempted to suppress such extortions. The form in which indictments could be made was regulated; and it was made illegal to imprison any man unless after an indictment in due form. But it was only the decay of the forest administration which could put an end to abuses which were inherent in it.

(2) We have seen that in other branches of the law the Common Law Courts tended to encroach upon the jurisdiction of rival courts. They had from early times exercised a sort of superintendence over the court of Justice Seat. The justices in eyre could always adjourn a point for the consideration of the court of King's Bench.[1] The court of King's Bench might decline to hear a case that ought properly to be decided by the forest law.[2] But we can see from Coke's Fourth Institute that the tendency to emphasize the control of the Common Law Courts is growing. Coke lays it down, generally, that the forest law is "allowed and bounded by the common laws of this realm."[3] Thus, if a man is unlawfully imprisoned by a forest officer, he can get his release by habeas corpus from the King's Bench.[4] If injustice is done at the Justice Seat, the case can be removed

[1] See case of 1339 cited, Select Pleas xi., in which the King's Bench decided that the roe was not a beast of the Forest.

[2] Keil. 150 b, pl. 43. Cp. Duke of Norfolk v. Duke of Newcastle (1666) Sid. 296. [3] 4th Instit. 290; so Manwood 410, 526. [4] 4th Instit. 290.

by certiorari into the King's Bench.[1] If the Justice Seat declines to allow a just claim, the King's Bench may direct that court to hear and allow the claim.[2] If the decision of the Justice Seat is wrong in law a writ of error will lie to the King's Bench.[3]

(3) We have seen that the ordinary forest courts could do very little except present criminals at the Eyre. It was at the Eyre that they were punished; so that it may be said that the whole execution of the forest law depended upon the regular holding of the Eyre. But by the end of the 16th century Eyres were seldom held, and, if held, seldom completed. Manwood describes the state of things existing at his day, and points to the desuetude of the Eyre as one of the main causes of the decay of the forest law.[4] The desuetude of the Eyre meant, in fact, the collapse of the whole system. The regular administration of the forest laws had decayed. Extensive grants had been made by the crown of the privileges of chase and free warren. Statutes had allowed the owners of land within the forest to enclose.[5] We can see that, at the beginning of the 17th century, the privileges of sporting or hunting are the privileges of the landed gentry, rather than the exclusive privilege[6] of the crown. This led to the rise of the Game Laws which are, as Blackstone called them, a "bastard slip" of the forest law.[7]

In 1246, 1275 and 1276 laws were passed against tres-

[1] 4th Instit. 294. [2] Ibid 297; F.N.B. 230. [3] 4th Instit. 297.

[4] 161, 162, "But now of late within these hundred years there have been very seldom any Justice Seats at all kept for Forests. And when that there is any kept, the same is so slenderly performed, that there is very little or no good at all done thereby . . . for the records of the proceedings of the Forest matters are not orderly kept, nor returned into His Majesty's Court of Exchequer . . . whereby the rents growing due unto His Majesty . . . with the fines that are assessed and not paid, and all bonds that are forfeited unto the king for any matter concerning the Forest, might, in due course of law, be levied and gathered to the King's use: for, nowadays, if it do chance that a Justice Seat be kept for any one forest, the same is seldom or never finished . . . and some few fines, and perhaps none at all, for any offence paid. And then, when the Justice in Eyre of the Forest doth chance to die, the records of the Forest remaining in some private man's hands, and not returned into the court of Exchequer, by some means or other they are smothered, so that they do never come to light. . . . But if that Justices of the Forest would duly hold their Justice Seats, and cause perfect records thereof to be kept; or else if they would cause the records of their proceedings to be returned into His Majesty's Court of Exchequer, whereby there might be execution of their proceedings . . . then the laws of the Forest would be better known, and also more regarded than they are now at this day."

[5] 22 Ed. IV. c. 7; 35 Henry VIII. c. 17; 13 Eliza. c. 25.

[6] Manwood 378, 379 ascribes much of the decay of the forests to the excesses of Purlieu men, "Londoners," and other strangers.

[7] Comm. iv 409.

passers in parks.[1] An act of 1389 recites that "artificers, labourers, and servants" go hunting in parks and warrens, and prohibits the taking of "gentlemen's game" by any who has not land to the value of 40s. An act of 1494 was directed against persons who take pheasants or partridges upon the land of another person without the licence of the owner. A similar act was passed in 1581. Another and a far more stringent act was passed in 1609. This was followed by other acts in 1670 and 1706. Their effect was, that only those who had freehold to the value of £100, and certain others, could kill game at all. The right to kill game became "the privilege of a class at once artificial and ill-defined."

The forest laws were again brought to light in the earlier part of the 17th century. The Parliamentary opposition to the Stuarts rested their case upon old precedents. The supporters of the prerogative were not slow to follow the lead thus given to them. From 1632 to 1637 Justice Seats were held by Lord Holland, Chief Justice in Eyre.[2] The result was a large number of fines and amercements for then almost forgotten offences, and the afforestment of large tracts of country which had long been free from the forest law. In Rockingham forest, for instance, the bounds of the forest were enlarged from six to sixty miles, and the Earl of Salisbury was fined £20,000, the Earl of Westmoreland £19,000, Sir Christopher Hatton £12,000.[3] These proceedings were the occasion of an act of the Long Parliament which finally fixed the boundaries of the forests.[4] The boundaries of the forests were to be the boundaries which were existing in the twentieth year of James I.'s reign. No place at which a forest court had not been held for sixty years preceding the first year of Charles I.'s reign was to be accounted forest. Provision was made for the issue of commissions to ascertain boundaries. No place disafforested since the twentieth year of James I.'s reign was to be in consequence afforested.

After the Restoration little more is heard of the forest laws. The Courts of Common Law still continued to limit the jurisdiction of the forest courts. It was decided in 1666 that no presentment or conviction by a forest court could bar a common law action for trespass upon the same facts.[5] In

[1] For these laws see Select Pleas cxviii-cxxii, and Stephen, H.C.L. iii 277-282.

[2] Gardiner, History of England, vii 363; viii 77, 86, 282. See Sir W. Jones' Reports for the eyre in Berkshire in 1632 at pp. 266-298.

[3] As was usual the fines levied were considerably less than those set, above 281.

[4] 16 Car. I. c. 16; see Commissioners of Sewers v. Glasse (1874) L.R. 19 Eq. at p. 157.

[5] Duke of Norfolk v. Duke of Newcastle, Sid. 296.

1689 it was decided that even the Chief Justice in Eyre could not legally commit to prison, unless the offender was duly presented or taken with the mainour.[1] At the end of the 17th century a forest Eyre was held by the Earl of Holland.[2] Roger North describes it as an interesting legal curiosity, teaching much of the history of law.[3] "It is not readily conceived what advantage here was by gaining an idea of the ancient law in the immediate practice of it. For the court of the forest is in nature of an iter; and the justices proceed as anciently the justices in eyre did, by presentments, claims, seizures, replevins, etc., very unlike the ordinary processes of the common law in courts of pleas. It is true that commissions of oyer and terminer and gaol delivery are eyre also, but restrained to personal crimes. Here it is of rights and those after, a peculiar law of forests, as privileges, franchises, grants, customs, purprestures, and offices of divers authorities and jurisdictions."

Acts of the 19th century have entirely remodelled the jurisdiction over the forests, and the forest law. In 1817 the offices of Warden, Chief Justice, and Justice in Eyre of the royal forests were abolished.[4] In 1829[5] the powers of these officials were vested in the first commissioner of His Majesty's Woods, Forests and Land Revenues. Extensive powers over existing forestal officers, and over disputes as to forest boundaries, were vested in the commission.[6] The jurisdiction of the Court of Attachment was regulated. The Verderers, in the court of Attachment, were given a jurisdiction to enquire into unlawful enclosures, and into the conduct of their subordinates.[7] But it is specially provided that, "nothing herein contained shall extend . . . to prevent His Majesty from proceeding by information in his court of Exchequer, or from having recourse to any other law, which may now exist, for the punishment of offences of the nature herein before mentioned, in all cases where such proceedings shall be deemed more advisable than those which are authorized by this Act."[8] In 1832 the powers of this commission were

[1] Case of Lord Lovelace, Comb. 159. [2] Bl. Comm. iii 73.
[3] Life of Lord Keeper Guilford i. 57.
[4] 57 Geo. III. c. 61. The Act recites that they are "offices of considerable emolument, and by reason of the disafforesting of many of the great Forests and the enclosing of others of such Forests, and the regulations which have from time to time been made relative to the management of the Woods, Forests, and Land Revenues of the Crown . . . the efficient duties of the said offices have in a great measure ceased." [5] 10 Geo. IV. c. 50 § 95. [6] §§ 14, 94, 96. [7] §§ 100-102.
[8] § 103. It was provided (§ 104) that penalties not directed to be recovered before the Verderers might be recovered before a Justice of the Peace.

handed over to the commission of Woods, Forests, Land Revenues, Works and Buildings.[1] In 1851 the commission of Woods, Forests, and Land Revenues was separated from that of Works and Buildings. The greater part of the control over the forests was assigned to the former board.[2] But the control of the board is subject to numerous local acts which have been passed to deal with particular forests.[3]

(4) The Ecclesiastical Courts.

The Ecclesiastical Courts have a longer history than the Courts of Common Law and Equity. At all periods in their long history prevailing theories as to the relations between Church and State have influenced both the law which they administer, and their position with regard to the English judicial system. If therefore we are to understand the arrangement of the Ecclesiastical Courts at different periods, and the sphere of jurisdiction assigned to them, it will be necessary to say something by way of introduction upon these matters. We can then proceed to treat of the courts themselves and their jurisdiction.

(i) The law administered by the Ecclesiastical Courts, and their relation to the English judicial system.

This subject falls naturally and chronologically into two divisions (*a*) the Pre-reformation, and (*b*) the Post-reformation period.

(*a*) *The Pre-reformation period.*

Throughout this period political and religious ideas were dominated by the theory of the survival of the Holy Roman Empire. It may be that in the common affairs of life, in the smaller associations in which men were grouped in a feudal state, this theory played little direct part. But in the law of the church, as administered in the Ecclesiastical Courts throughout Latin Christendom, it was all important. The Roman Empire had not perished. The Roman Emperor, represented by the emperor of Germany, still ruled the world in matters temporal; the Pope in matters spiritual. "The Pope, as God's vicar in matters spiritual, is to lead men to eternal life; the Emperor, as vicar in matters temporal, must so control them in their dealings with one another that they may be able to pursue undisturbed the spiritual life, and thereby attain the same supreme and common end of ever-

[1] 2 Will. IV. c. 1. [2] 14, 15 Vict. c. 42.
[3] For a list see Encyclopædia of English Law, Tit. Forests. Cp. Pollock, Land Laws, 182, 183.

lasting happiness. In the view of this object his chief duty is to maintain peace in the world, while towards the Church his position is that of Advocate, a title borrowed from the practice adopted by churches and monasteries of choosing some powerful baron to protect their lands and lead their tenants in war. The functions of Advocacy are twofold: at home to make the Christian people obedient to the priesthood, and to execute their decrees upon heretics and sinners; abroad to propagate the faith among the heathen, not sparing to use carnal weapons. Thus the Emperor answers in every point to his anti-type the pope, his power being yet of a lower rank, created on the analogy of the papal, as the papal itself had been modelled after the elder Empire."[1] To Pope and Emperor the other rulers of the earth were subordinate.

On its temporal side this theory tended to become more and more untrue with the growth, during the Middle Ages, of the territorial state. But the influence of the old theory can be seen in the preamble of Henry VIII.'s statute which asserts that "by dyvers sundrie olde autentike histories and cronicles it is manifestly declared and expressed that this realme of England is an impire, and so hath ben accepted in the worlde, governed by oon supreme heede and King, having the dignitie and roiall estate of the imperiall crowne of the same."[2]

The changing condition of Europe did not so obviously affect the dominion claimed by the Pope in matters spiritual. The claim of the Pope to be the head of a universal church was, in the Middle Ages, far less a mere theory than the parallel claim of the Emperor to be the head of a universal state. The Pope wielded a real authority over the faithful; and, of the fate of those who sought to cut themselves off from the communion of the faithful, the Albigenses and Southern France could tell. At the beginning of the 14th century Boniface VIII. could claim that the Pope held the chief place, that the Emperor was but his feudatory.[3]

The dominion of the papacy had been consolidated during the 11th and 12th centuries by a series of able popes—pre-eminent among whom were Gregory VII. (1073-1080) and

[1] Bryce, Holy Roman Empire, 105, 106.

[2] 24 Henry VIII. c. 12. Cp. the Arrêt of the Parliament of Paris (1417) Ecclesiastical Commission 1883, 171, "Le Roi notre Sire est *Empereur en son Royaume*, non tenant d'aucun que de Dieu, et non resortissant à quelque personne ou Seigneur que ce soit: et comme Roi et Empereur peut faire Loix en son Royaume, contre lesquels nul de son Royaume peut venir, *directe nec indirecte*, et mêmement par voye d'appel sur peine de Leze-Majesté."

[3] Bryce, Holy Roman Empire, 109.

Innocent III. (1198-1216). It was maintained by the rules of the Canon Law which was accepted as the "jus commune" of the church throughout Europe. It was from the 11th to the 13th centuries—during the most splendid period of the papacy—that the greater part of the Corpus Juris Canonici was compiled.

Roman civil law had never wholly perished. But the revival of interest in its study begins in the early years of the 12th century, when Inerius began to lecture upon the Digest at Bologna. "Roman law was living law. Its claim to live and to rule was intimately connected with the continuity of the empire."[1] A famous school of law was founded. The systematic study of the civil law produced a desire to reduce to a similar system the scattered rules of the canon law. Gratian, a monk of Bologna (1139-1142), gathered them up into a systematic treatise.[2] The nature of his work is well illustrated by the name applied to it when it first appeared. It was called the "Concordia Discordantium Canonum." Later it was known as the Decretum Gratiani. Henceforth the Canon Law stood side by side with the Civil Law. The University of Bologna possessed two faculties of law—the civil and the canon. The students were decretistæ or legistæ.[3] There were doctores decretorum, doctores legum, or doctores utriusque juris.

The Corpus Juris Canonici is made up of the following parts:—(1) The Decretum Gratiani. This comprehended all the papal legislation down to the year 1139. The activity of papal legislation[4] soon rendered a fresh compilation necessary. Several private collections were made. The collection made by Bishop Bernard of Pavia in five books is noteworthy as having supplied the method of arrangement of later portions of the Corpus Juris.[5] (2) The Decretals of Gregory IX. (1234). This was composed of the decisions of the pope upon matters referred to him from all parts of Europe. (3) The Liber Sextus of Boniface VIII. (1298). As its name would imply it is intended as a supplement to Gregory's five books. It contains not decisions, but abstract rules of law, which are no doubt extracted from the decisions.

[1] P. and M. i 89.

[2] Ibid 92; Encyclopædia Britannica (9th Ed.) sub voc. Canon Law.

[3] Alternative names were canonistæ and civilistæ.

[4] Innocent III. is said to have published 4000 laws.

[5] The five books dealt with (1) ecclesiastical officials and judges; (2) procedure in Ecclesiastical Courts; (3) rights, duties and property of the clergy: (4) marriage; (5) criminal law and ecclesiastical discipline: "Judex, Judicium, Clerus, Connubia Crimen."

(4) The Clementinæ (1313). (5) The Extravagantes, i.e. the more important of later decretals. These were never formally promulgated as a code like the preceding four branches of the law.[1] Professors of the canon law added many explanatory notes (glosses) to the text. Generally one gloss was accepted as the most important and was called the Glossa Ordinaria.[2]

The canon law was received in England, as in other parts of Europe, as the jus commune of the church. The English provincial constitutions formed but a small part of the law of the church. "They contain little that is new, and are only a brief appendix to the common law of the universal church."[3] William Lyndwood—the official principal of the Archbishop of Canterbury—wrote a commentary upon them in 1430, which has always been reckoned a leading authority in ecclesiastical law.[4] He clearly regards them as a supplement merely to the jus commune of the church. The decretals of the pope are the edicts of a sovereign legislator whose authority it is heresy to question. Provincial constitutions are valid only in so far as they interpret or enforce these papal decrees.[5] The test exacted of persons suspected of Lollardry was subscription to the Decretum, the Decretals, the Sext, and the Clementines.[6]

The canon law recognised the pope not only as the supreme legislator, but also as supreme judge of the Church, possessed not merely of appellate, but also of original jurisdiction. He could be called in by a litigant at any stage in the suit; and not merely the judgments he pronounced, but also any dicta he might be inclined to express, had the force of law.[7] He could delegate his powers to legates *a latere*, who, by virtue of their commission, superseded all the ordinary courts. "The metropolitan must plead as plaintiff before the suffragan, the superior before the inferior, if the *princeps* will have it so."[8] In fact the Pope could, and did to a large extent, make himself the "Universal Ordinary." He has, says Bracton,[9] ordinary jurisdiction over all in things

[1] Encyclopædia Britannica (9th Ed.) sub voc. Canon Law; P. and M. i 92, 93.
[2] Instances are, Johannes Teutonicus (1212) and Bartholomæus Brixensis (1258) on the Decretum; Bernardus Parmensis (1266) on the Decretals; Joannes Andreæ (1318) on the Sext and the Clementines.
[3] Maitland, Canon Law, 37. [4] Ibid 4-6. [5] Ibid 16-42. [6] Ibid 46.
[7] Ibid 103-105, 130. [8] Ibid 129.
f. 412 (cited ibid 106 n. 1). "Imprimis sicut dominus papa in spiritualibus super omnibus habeat ordinariam jurisdictionem, ita habet rex in regno suo ordinariam in temporalibus, et pares non habet neque superiores; et sunt qui sub eis ordinariam habent in multis, sed non ita meram sicut papa vel rex."

spiritual, as the king has ordinary jurisdiction over all in his realm in things temporal. It is clear from books of practice on the canon law that whenever any considerable sum was at stake in an action the usual course was to "impetrate" an original writ from Rome nominating papal delegates to hear the case.[1] In the 13th century the number of English cases which came before the pope was larger than that from any other country in Europe.[2] The methods by which, as we shall see, the Archbishop of Canterbury has attracted much of the business of the ordinary courts to his provincial courts, have been suggested by the practice of the Roman Curia.[3]

Such, then, was the system of the canon law, in force in England as in all the other countries of Western Europe. But the church and its law must necessarily exercise its activity within a state; and, whatever extreme churchmen might contend for, it was impossible that all ecclesiastical persons should live exempt from all temporal jurisdiction. Moreover, the canon law attempted to exercise a wide control over the laymen pro salute animæ. As the state grew into conscious life it was inevitable that occasions for disputes between the temporal and spiritual powers should arise. Two systems of courts exercising two systems of law cannot coexist in one state without disputes as to the limits of their respective authority. Within a certain sphere each was supreme. But there was always a debatable land over which neither party was completely sovereign.

The precocious growth of the state in England brought this necessary antagonism between the claims of Church and State into prominence at a comparatively early period. The controversy about investitures was settled in England in 1106. It was not till 1122 that a similar controversy in Germany was ended by a similar compromise. In the royal writ of prohibition the royal courts had a weapon of precision which in the end secured for them the jurisdiction which they claimed. All questions touching lay fee, all questions concerning advowsons, all criminal cases, save cases of felony where a clerk was the culprit, all cases of contract and tort, were gradually drawn in to the royal courts. They were drawn

[1] Maitland, Canon Law, 108-115. This is clear from William of Drogeda's Summa (1239) dealing with procedure in ecclesiastical cases.

[2] Ibid 122, 123. Knowledge of the Canon Law was an avenue to preferment. Peckham was Auditor Causarum at Rome before he was Archbishop of Canterbury. Simon of Sudbury was one of the judges of the Rota at Rome. Chicheley was Doctor of Civil and Canon Law, Hale, Precedents of Cases in the Ecclesiastical Courts, xxxii, xxxiii.

[3] Ibid 116-120.

into the royal courts in spite of the protests of churchmen. Though churchmen sitting as royal justices helped to secure the victory of the common law, it is clear that the canon law and the churchmen *qua* churchmen must have regarded them as encroachments.[1] Similarly, statutes, like the statutes of Provisors and the two statutes of Præmunire, attempted to check, in the interests of patrons and of the state, the abuses of papal patronage. The aim of the statute of Provisors[2] was to protect spiritual patrons against the pope. If the pope attempted to appoint, the right of presentation lapsed to the crown. The bishops took no public part in the enactment of this statute. The first statute of Præmunire[3] punished those who drew "any out of the Realm in Plea *whereof the cognisance pertaineth to the king's court*, or of things whereof judgments be given in the king's court, or which do sue in any other court to defeat or impeach the judgment given in the king's court." The statute plainly says nothing of cases over which the king's court never claimed jurisdiction. The second statute of Præmunire[4] was aimed at those who "purchased or pursued, in the Court of Rome or elsewhere," any "Translations, processes, and sentences of Excommunications, Bulls, Instruments, or any other things whatsoever which touch the king, against him, his crown, and his regality,"[5] whereby the king's court was hindered in its jurisdiction over pleas of presentment. The guarded answer returned by the bishops, in reply to the question addressed to them as to the papal power in this respect, shows an obvious desire to conciliate the Parliament without committing themselves to any statement contrary to canon law.[6] It is clear that such legislation is as "anti-ecclesiastical" as the issue of writs of prohibition. To argue from such legislation, or from

[1] Maitland, Canon Law, 74, "Some of these prelates were in all likelihood far more at home when they were hearing assizes as *justiciarii domini regis* than when they were sitting as *justices ordinarii*, and they were already leaving the canon law to their schooled officials. . . . Many a mediæval bishop must have wished that, besides having two capacities, he had been furnished with two souls, unless indeed, the soul of one of his subordinates would serve as an *anima damnanda*." [2] 25 Ed. III. St. 6; Maitland, Canon Law, 69.

[3] 27 Ed. III. St. 1 c. 1. [4] 16 Rich. II. c. 5. [5] § 6.

[6] § 4. The spiritual peers being asked their advice as to papal claims protested "quil n'est pas lour entention de dire ne affirmer que nostre Saint Piere le Pape ne poet excommenger Evesques ne qu'il poet faire translations des Prelatz solonc la ley de Seinte Eglise"; but said that if bishops were excommunicated for obedience to the Pope's commands; or such translations are made whereby the king is deprived of them against his will; "que ce est encountre le Roi et sa corone sicome est contenuz en la petition avant nome." For the council of Merton and legitimation per subsequens matrimonium see Maitland, Canon Law, 53-56. For purposes other than that of descent to land the canon law rule prevailed.

the issue of such writs, that the Ecclesiastical Courts imagined that they were independent of the Pope or the canon law, would be about as reasonable, as to argue from the Grand Assize, and the possessory assizes that the feudal courts admitted the royal claim to jurisdiction over all cases of ownership or possession of freehold.

The state successfully asserted its rights to the jurisdiction which it claimed. But we can see from the benefit of clergy,[1] and from the statute of Circumspecte Agatis,[2] and the Articuli Cleri[3] that it was willing to allow a large sphere to the Ecclesiastical Courts and the canon law. In one respect, indeed, it allowed to the rival jurisdiction a larger authority than it possessed in any other country in Europe. It abandoned to it absolute jurisdiction over testamentary and intestate succession to personal property.[4] Where the jurisdiction of the Ecclesiastical Courts was admitted, the state automatically enforced their sentences of excommunication by the imprisonment of the excommunicate.[5]

Thus matters stood before the Reformation. The jus commune of the Western Church was administered in the Ecclesiastical Courts. The common law was administered in the royal courts. The royal courts claimed exclusive jurisdiction in certain matters. Other matters they were content to leave to the Ecclesiastical Courts. Certain rights allowed to the pope by the canon law had been curtailed by English statutes, which the royal courts would enforce if called upon to do so. Within their respective limits the canon law enforced by the Ecclesiastical Courts, and the common law enforced by the royal courts were separate systems of law, differing in many of their rules, deriving their binding force from different sovereigns.

The claims made by these rival systems produced much friction. But the prevailing theories as to the relations between church and state made it impossible for either of these rival powers to do without the other. Papal dispensations from the rules of the canon law acknowledged the power of the pope; but they enabled the crown to use the revenues of ecclesiastical benefices for the maintenance of his civil service. Diplomatic reasons demanded some kind of arrangement; and at the latter end of the Middle Ages an arrangement was arrived at on a profit-sharing basis. Such an arrangement produced peace; but it was a peace

[1] Below 382, 383. [2] 13 Ed. I. St. 4. [3] 9 Ed. II. St. 1. [4] Below 392-399.
[5] Maitland, Canon Law, 58, 59; below 400; App. XVIII.

which made reform impossible. Abuses were allowed to spring up unchecked until an entirely new theory as to the relations between Church and State materially altered both the law administered in the Ecclesiastical Courts, and their relation to the English judicial system.

(*b*) *The Post-Reformation period*

At the beginning of the 16th century many circumstances combined to show that the old theories as to the relations between Church and State were breaking down. All over Europe centralized territorial states were taking the place of the loosely knit feudal monarchies of the Middle Ages. The wealth and corruption of the church, and more particularly the abuses of the Ecclesiastical Courts, were exciting extreme unpopularity. The doctrines of the church, also, were beginning to be assailed with the more effective weapons which the New Learning had provided. The better class of ecclesiastical statesmen saw clearly that some reform was necessary.

England, like the rest of Europe, felt these influences. Cases like that of Hun[1] bore witness to the unpopularity of ecclesiastics, their courts, and officials. We can see from the case of Standish[2] that Henry VIII., backed by popular opinion, was minded to assert a larger control over ecclesiastics. Wolsey, who was perhaps the most far-seeing statesman of the day, was already taking measures to reform the corruption of the church. But neither Henry nor England had any desire to separate from the general system of the Western church. There were but few adherents to Protestant doctrine. If the pope would consent to Henry's demands for an increased control over the clergy; if the church had been reformed as Wolsey desired, there appeared to be no necessity for a break with Rome. The Anglican church might have had a history very similar to that of the Gallican church.[3]

The divorce question made this solution impossible. The pope coerced by Charles V. could not grant the divorce. A break with Rome was therefore necessary. Although the break was accomplished with as little external change as possible, it necessarily involved an altogether new view as to the relations between Church and State.

The tentative way in which the separation was carried out shows how unwilling Henry was to break with the past. The attitude of the pope, however, rendered separation

[1] Hallam, Constitutional History, i 59; Stephen, H.C.L. ii 452, 453.
[2] Maitland, Canon Law, 87-89.
[3] Ibid 85-87; Ecclesiastical Commission 1883, 170-176.

inevitable. In the preambles to Henry's statutes we may see the gradual elaboration of the main characteristic of the changed relations of Church and State—the theory of the Royal Supremacy. The dual control over things temporal and things spiritual is to end. The Crown is to be supreme over all persons and causes. The Canon Law of the Western Church is to give place to the "King's Ecclesiastical Law of the Church of England."[1]

The Reformation Parliament met in 1529 after the fall of Wolsey. The first acts of that Parliament, carried in spite of the opposition of the clergy, were directed against certain abuses in the church and its courts.[2] The clergy also (1531) recognised the royal Supremacy "so far as the law of Christ allows."[3] In 1532 it was so clear, from the unsatisfactory progress of the divorce, that there would be legislation aimed more directly at Rome, that Warham, the archbishop of Canterbury, drew up a formal protest against all statutes to be passed in the ensuing session, which should prejudice the ecclesiastical or papal power.[4] An act was passed against the payment of Annates. But the act is still respectful to "our Holy Father the Pope"; who was still allowed to charge certain fees for the consecration of bishops; and the king was given a discretion as to its enforcement.[5] In 1533 the Statute of Appeals was the necessary consequence of the king's marriage and of the divorce proceedings taken before Cranmer.[6] In the preamble to that statute the new relations between Church and State were sketched by the king himself. We have in it the first clear statement of the new Anglican position. "By divers sundry old authentic histories and chronicles it is manifestly declared . . . that this realm of England is an empire . . . governed by one supreme head and king . . . unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality be bounden and owe to bear next to God a natural and humble obedience; he being also institute . . . with plenary whole and entire power, pre-eminence, authority, prerogative and jurisdiction to render and

[1] The first mention of this term is in 27 Henry VIII. c. 20 § 1.

[2] 21 Henry VIII. c. 5 (Probate); 21 Henry VIII. c. 6 (Mortuaries); 21 Henry VIII. c. 13 (Pluralities).

[3] See the recognition printed at pp. 70, 71 of the report of the Ecclesiastical Commission of 1883.

[4] Ecclesiastical Commission 1883, 33. [5] 23 Henry VIII. c. 20.

[6] 24 Henry VIII. c. 12. See the reprint of the statute with the alterations made by the king in the preamble at pp. 213, 214 of the Ecclesiastical Commission report of 1883.

yield justice and final determination to all manner of folk, residents, or subjects within this his realm in all causes . . . happening to occur . . . within the limits thereof without restraint or provocation to any foreign princes or potentates of the world. The body spiritual whereof having power when any cause of the law divine happened to come in question or of spiritual learning, it was declared . . . by that part of the said body politic called the spirituality (now being usually called the English Church) which . . . is sufficient and meet of itself, without the intermeddling of any exterior person . . . to declare and determine all such doubts and to administer all such offices and duties as to their rooms spiritual doth appertain . . . : and the laws temporal for trial of property of lands and goods for the conservation of the people of this realm in unity and peace . . . was and yet is administered . . . by sundry judges and administers of the other part of the said body politic called the temporality, and both their authorities and jurisdictions do conjoin together in the due administration of justice the one to help the other: and . . . the king his most noble progenitors and the nobility and commons of this said realm at divers and sundry Parliaments as well in the time of king Edward I., Edward III., Richard II., Henry IV., and other noble kings of this realm made sundry . . . laws . . . for the entire and sure conservation of the prerogatives, liberties, and pre-eminences of the said imperial crown of this realm, and of the jurisdictions Spiritual and Temporal of the same, to keep it from the annoyance as well of the see of Rome as from the authority of other foreign potentates."[1] The king is supreme in his realm. His courts, spiritual and temporal, can decide for themselves all cases which occur within the realm. This has always been the law. The anti-ecclesiastical statutes of the Middle Ages are vouched to support the historical theory put forward by the state. When the state's theory has been accepted by the church, it will be an appropriate statutory foundation for the modern ecclesiastical claims of the church, now part of the state, and subject to the royal supremacy.

Later statutes of Henry's reign further amplified and

[1] It may be useful to contrast with this preamble the following passage from Bracton (*f* 5 b), "Apud homines vero est differentia personarum, quia hominum quidam sunt præcellentes et prelati, et aliis principantur. Dominus Papa videlicet in rebus spiritualibus, quæ pertinent ad sacerdotium, et sub eo archiepiscopi, episcopi, et alii prælati inferiores. Item in temporalibus sunt imperatores, reges, et principes in hiis quæ pertinent ad regnum, et sub eis duces, comites, barones, magnates sive vavasores, et milites." The two passages well represent the old order and the new.

defined the supremacy which he claimed. The Act of Supremacy recognised the king as "the only Supreme Head in earth of the Church of England,"[1] having full power to correct all "errors, heresies, abuses, offences, contempts, and enormities" which by any manner of spiritual authority ought to be reformed; and the oath taken in accordance with this act denies to the pope any other authority than that of bishop of Rome.[2] It was in accordance with this act that Henry gave an extensive commission to Cromwell to act as his Vicar-General. It is clear that Henry is beginning to regard himself as possessing all that "usurped" authority which once belonged to the pope. This is shown by the act of 1545[3] which declares that the king has power to exercise all ecclesiastical jurisdiction, "and that the archbishops, bishops, archdeacons, etc., have no manner of jurisdiction ecclesiastical but by, under, and from the king." In accordance with this theory the bishops and archbishops took out commissions to exercise their ordinary powers and authorities.[4]

Most of the other acts of Henry's reign are the logical consequence of these changed relations between church and state. Annates and all other payments to Rome were definitely cut off.[5] In the act for the submission of the clergy[6] it was provided that no new canons should be enacted, except in convocations summoned by the king's writ, with licence to assemble and make canons. The existing canons were to be revised by a committee of 32, of whom 16 were chosen from laymen and 16 from ecclesiastics. Further provision for this revision of the canon law was made by other statutes of this reign; and it was enacted that, in the meantime, those which did not conflict with God's law and the king's should be still in force.[7] No such revision was in fact made in Henry VIII.'s reign. But the teaching of the canon law was in every way discouraged at the universities. In place of lectures on canon law lectures on civil law were established. Degrees soon cease to be taken in canon law as a separate faculty.[8] The act of 1545 allowed the doctors of the civil law, though laymen and married, to exercise ecclesiastical jurisdiction. This discouragement of the canon law was a necessary consequence of Henry's settlement. It is clear that the canon

[1] 26 Henry VIII. c. 1.
[2] Report of Ecclesiastical Commission 1883, 72.
[3] 37 Henry VIII. c. 17.
[4] Report of Ecclesiastical Commission 1883, 37, 38.
[5] 25 Henry VIII. c. 20.
[6] 25 Henry VIII. c. 19.
[7] 27 Henry VIII. c. 15; 35 Henry VIII. c. 16.
[8] Strype, Memorials, i c. 29; Anthony Wood, Fasti s.a. 1536; Hale, Precedents, etc., xxxiv, xxxv.

law as taught in the Middle Ages would have been in entire conflict with the new order.[1]

Thus it may be said that the great work of Henry's reign was to effect an entire change in the relations between church and state. The church ceased to form part of the Western church in communion with Rome. The law of the church ceased to be the canon law of Rome. But beyond that there was little change. The Act of the Six Articles reaffirmed most of the leading doctrines of the Roman Catholic Church.[2] The existing organization of the Ecclesiastical Courts was maintained. The king had put himself in place of the pope. The king's ecclesiastical law administered by civilians was put in place of the canon law of Rome. "The Reformation," says Archdeacon Hale,[3] "if under that general term we may include the whole series of events by which this country was freed from the authority of the Bishop of Rome, was in its commencement nothing more than a legal and political Reformation; a renunciation of the intrusive power of the Pope over the King's subjects, and an assertion of the competency of the Anglican Church to decide by her own tribunals all questions relative to Divine Law and to spiritual learning. A Reformation in religion soon followed; but it was a providential and not a necessary consequence."

Little need be said of the reigns of Edward VI. and Mary.[4] They are episodes which added little of permanent importance to Henry's settlement. Edward VI. applied the doctrine of the royal supremacy in its extreme form. Henry had left the authority of the bishops unimpaired. Edward in many cases excluded their authority. He directly appointed them. Process in the Ecclesiastical Courts ran in his name. Only those who had special authority from him could exercise jurisdiction. Frequent commissions issued by him, in virtue of his supremacy, in many cases superseded the authority of the ordinary courts. As we might expect, their jurisdiction fell into contempt.[5] The reform in doctrine and the reform of the canon law was hastily pressed forward. Mary on the

[1] Maitland, Canon Law, 92-99. As to the persons competent to be judges under the older law see Ecclesiastical Commission 1883, 26. Henry could not trust the ecclesiastical lawyers to administer an ecclesiastical law which was destitute of the leading principle of the older system—the supremacy of the pope.

[2] 31 Henry VIII. c. 14.

[3] xxxvi, xxxvii. At p. xxxix he points out that there was no change in the ordinary routine of the courts; the officials made no change except that of adding to their names the words "regia auctoritate suffultus."

[4] Ecclesiastical Commission 1883, 41-43; Hale xliv-xlvii.

[5] The Consistory Court of London has no act books between the years 1546 and 1554, Hale xliv.

other hand went to the opposite extreme. The old state things as it existed in 1529 was as far as possible restored.

Elizabeth's reign is marked by a recurrence to Henry VIII.'s principles, both as regards the relation between church and state, and as regards the position and jurisdiction of the Ecclesiastical Courts. "The policy of Elizabeth and her ecclesiastical settlement is historically linked on directly to that of her father."[1] The church was given a more definitely Protestant character, but with as little change of the older order as was possible. In the Acts of Supremacy and Uniformity the relations between church and state are permanently and definitely ascertained.

The Act of Supremacy[2] annexed to the "imperial crown of this realm" all "such jurisdictions, privileges, superiorities and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastieal power or authority hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state, and persons, and for reformation, order and correction of the same and of all manner of errors, heresies and schisms abuses offences contempts and enormities." The supremacy was of wide and somewhat indefinite extent. But it did not go the whole length of Henry VIII.'s later statutes or of Edward VI.'s statutes.[3] The crown made no claim to "the ministering either of God's Word or of the Sacraments."[4] The older organization of the Ecclesiastical Courts was maintained. The crown simply claimed to be supreme over all causes and persons to the exclusion of any foreign power.

With a view to the better maintenance of the Supremacy, and the ecclesiastical settlement therein involved, the crown was empowered to entrust its exercise to commissioners appointed under the Great Seal.[5] In thus exercising the royal jurisdiction by commission precedents of Edward VI. and Mary's reign were followed.[6] The power was exercised when the Court of High Commission was created in 1559.

Some attempts were made to pursue the plan of revising the canon law. But though the revision had been completed by Cranmer and Peter Martyr, it never obtained legislative sanction.[7] The canon law, so far as it was in harmony with the new settlement, still continued to be administered by the

[1] Ecclesiastical Commission 1883, 41. [2] 1 Eliza c. 1 § 8.
[3] The form of oath to be taken in accordance with the Statute (§ 9) declared the Queen to be "supreme Governor."
[4] Article 37; cp. Ecclesiastical Commission 1883, 73.
[5] 1 Eliza c. 1 § 8. [6] Ecclesiastical Commission 1883, 49. [7] Ibid 45.

civilians, who combined their practice in the Ecclesiastical Courts with their practice in the court of Admiralty,[1] As the exercise of the jurisdiction of the court of Admiralty was controlled by the writ of prohibition, so (in spite of all protests)[2] was the exercise of the jurisdiction of the Ecclesiastical Courts.

Administered in this way, the law of the church, like the maritime law, has ceased to possess an international character.[3] It has become national like the church itself. "The ecclesiastical law of England," said Lord Blackburn,[4] "is not a foreign law. It is a part of the general law of England —of the common law—in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law administered in the courts of Queen's Bench, Common Pleas, and Exchequer, to which the term common law is in a narrower sense confined, but also that law administered in Chancery and commonly called Equity, and also that law administered in the courts Ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent

[1] In 1832 the Ecclesiastical Commissioners (at p. 13) reported that the ecclesiastical laws . . . have been for upwards of three centuries administered in the Principal Courts by a body of men, associated as a distinct profession, for the practice of the Civil and Canon Laws. Some of the members of this body in 1567 purchased the site upon which Doctors' Commons now stands, on which, at their own expense, they erected houses for the residence of the Judges and Advocates, and proper buildings for holding the Ecclesiastical and Admiralty Courts, where they have ever since continued to be held. In 1768 a Royal Charter was obtained, by virtue of which the then members of the Society, and their successors, were incorporated under the name and title of "the College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts." It saw to the strict observance of the rule that only civilians should be appointed by the bishops as their chancellors, Ecclesiastical Commission 1883, 46. It was dissolved under the provisions of 20, 21 Vict. c. 77 §§ 116, 117.

[2] Coke, 2nd Instit. 601-609 gives the objections of Archbishop Bancroft and the answers of the judges. In his anxiety to escape from these prohibitions the archbishop comes near to hinting that there had been a breach of continuity. "As both the Ecclesiastical and Temporal jurisdictions be now united in his Majesty, which were heretofore *de facto* though not *de jure* derived from several heads, we desire to be satisfied by the judges, whether . . . the former manner of Prohibitions . . . importing an Ecclesiastical Court to be *aliud forum a foro regis*, and the Ecclesiastical law not to be *legem terræ*, and the proceedings in those Courts to be *contra Coronam et Dignitatem Regiam* may now without offence to the King's Ecclesiastical prerogative be continued, as though either the said jurisdictions remained now so distinguished and several as they were before, or that the laws Ecclesiastical, were not the King's and the Realm's Ecclesiastical Laws." To which the orthodox answer was given "that both jurisdictions were ever *de jure* in the Crown, though the one sometimes usurped by the see of Rome; but neither in the one time nor in the other hath ever the form of Prohibitions been altered, nor can be but by Parliament," pp. 601, 602.

[3] Above 327.

[4] Mackonochie v. Lord Penzance (1881) L.R. 6 A.C., at p. 446.

and custom within the realm, and form . . . the king's ecclesiastical law."

But though Henry's settlement as to the royal supremacy, as to the courts, and as to the ecclesiastical law was followed in its main lines, the doctrines of the church were given a more definitely Protestant character. The matters which the Court of High Commission could declare to be heresy were defined.[1] Statutory force was given by the Act of Uniformity, to the second book of common prayer of Edward VI.'s reign, with certain alterations and additions.[2] Not only the Ecclesiastical Courts, but also the justices of oyer and terminer and of assize, were empowered to see to the observance of the Act.[3]

This settlement has been fully accepted both by the judges and the bishops. In *Caudrey's Case*[4] "It was resolved that the said Act (the Act of Supremacy) . . . concerning ecclesiastical jurisdiction was not a statute introductory of a new law, but declaratory of the old."[5] The relations between church and state were explained almost in the words of the preamble of Henry VIII.'s statute of Appeals; and the historical argument, as to the continuous independence of the church, hinted at in that preamble, was expanded and improved. Though the Canon law had been laid under contribution it never was the law of the Church of England. "As the Romans fetching divers laws from Athens, yet being approved and allowed by the state there, called them notwithstanding jus civile Romanorum: and as the Normans borrowing all or most of their laws from England, yet baptized them by the name of the laws and customs of Normandy: so, albeit the kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here by and with a general consent, are aptly and rightly called the King's Ecclesiastical Laws of England."[6] In 1851 the two

[1] 1 Eliza c. 1 § 20; below 386. [2] 1 Eliza c. 2 § 2. [3] §§ 4 and 5.
[4] (1591) 5 Co. Rep. 1. [5] At p. 8 a.
[6] At p. 9 b; cp. p. 32 b, "If it be demanded what canons, constitutions, ordinances and syndols provincial are still in force within this realm, I answer that it is resolved and enacted by authority of Parliament, that such as have been allowed by general consent and custom within the realm, and are not contrariant or repugnant to the laws, statutes and customs of the realm, nor to the damage or hurt of the king's prerogative royal, are still in force within this realm, as the king's ecclesiastical laws of the same." Cp. also the Queen v. Millis (1844) 10 Cl. and Fin. 678 per Tindal, L.C.J., "The law by which the Spiritual Courts of this kingdom have from the earliest times been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those courts *proprio vigore*, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified

archbishops and the twenty bishops of England declared the "undoubted identity of the church before and after the Reformation"; and that though severed from Rome the church had in no respect severed her connexion "with the ancient Catholic Church."[1]

Neither the legal nor the doctrinal theory should blind us to the fact that a very real change had been made at the Reformation. The relations between church and state, and the position of the Ecclesiastical Courts were fundamentally altered. The church was brought within the state. It was subjected to the power of the crown. That has involved in the course of time other consequential changes. Having been brought within the state, its position has been modified with changed ideas as to the balance of powers within the state, and as to the limits of state control. The court of High Commission wielded the royal supremacy, when the royal supremacy over the church conferred powers as large and indefinite as the royal prerogative in the state. That court disappeared, with the court of Star Chamber, when so large a prerogative was found incompatible with liberty.[2] Similarly the royal supremacy conferred a wide dispensing power. That too was limited at the Revolution when it was found to put too large a discretionary power in the hands of the crown.[3] In later times the proper sphere of ecclesiastical jurisdiction has been curtailed. Membership of the church is not considered a necessary qualification for full rights in the state. The members of other religious communities have been admitted to share them. The jurisdiction of the Ecclesiastical Courts has necessarily been weakened by the disappearance of the idea that it is the duty of the state church to use coercive measures to secure, pro salute animæ, the morality of all the members of the state. On the other hand later statutes have provided new courts or new machinery for the more effective discipline of the clergy in communion with the church.[4]

and altered from time to time by the ecclesiastical constitutions of our Archbishops and Bishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law."

[1] Phillimore, Ecclesiastical Law (1895) 3. Cp. Martin v. Mackonochie (1868) L.R. 2 Ad. and Ecc. 116 for a full statement of the orthodox legal and ecclesiastical view.

[2] 16 Car. I. c. 11; 13 Car. II. St. 1 c. 12.

[3] Powell, J., in the Seven Bishops case (1688) 12 S.T. at p. 427, said to the jury, "I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of there will need no Parliament." Cp. Stillingfleet, Eccl. Cases, Discourse ii, chap. iii.

[4] Below 378-380.

In this manner the Tudor settlement, without sacrificing what was valuable in the institutions and the doctrines of the past, has founded a church well fitted to be an English State Church, because, like the constitution of the English State, it is capable of adaptation to altered circumstances without a palpable breach of continuity. In no respect did the Tudors more clearly show their capacity to understand and to represent their people. In the age of Elizabeth, when religious feeling ran high, it often appeared to the more enthusiastic that her establishment was neither Protestant nor Catholic. But however illogical it appeared to the fanatic, it appealed to the more moderate. Being successful it did not long want defenders; and it has secured defenders so skilful that they have made love for the Church an essential factor in English political life.

The lawyer has deduced from the uncertain utterances of Anglo-Saxon history, and from the anti-ecclesiastical legislation of the Middle Ages, the existence, from the earliest times, of an independent national church. The theologian has conferred upon it an unique Catholicity. The benches of judges and bishops have enunciated the same doctrines in language only technically different. In fact the Reformation did in a similar manner for the church, what the Revolution did for the state. Macaulay says of the Revolution, "the change seems small. Not a single flower of the crown was touched. Not a single new right was given to the people. The whole English law, substantive and adjective, was in the judgment of all the greatest lawyers, of Holt and Treby, of Maynard and Somers, almost exactly the same after the Revolution as before it. Some controverted points had been decided according to the sense of the best jurists; and there had been a slight deviation from the ordinary course of succession. This was all; and this was enough." The same sentiments, applied to the church, are both good law and sound doctrine. But if we look a little beyond the immediate consequences of either the Reformation or the Revolution we can see that the changes involved are very far reaching. The result of the Revolution was the transference of control over the executive from the prerogative to Parliament through the growth of the cabinet system. The result of the Reformation was the abolition of the dual control of church and state, the transference to the state of complete control over the church, and the substitution for the canon law of the King's Ecclesiastical Law. The crown's prerogative still retains traces of its origin in a feudal society; and it could be described by

Blackstone in terms which might have commanded the approval of a Stuart king, or the censure of a Stuart Parliament. The Church still retains her courts with some remnants of their ancient jurisdiction, and in her formularies some traces of a Catholicism older than that of Rome.

(ii) The Ecclesiastical Courts.

The courts which have administered the ecclesiastical law at different periods may be divided into the following groups:—

(1) The ordinary courts of the Diocese, the Peculiar and the Province.

(2) The High Court of Delegates.

(3) The Court of High Commission.

(4) The Statutory courts of the 19th century.

(1) The ordinary courts of the Diocese, the Peculiar, and the Province.

(*a*) *The Diocese.*

The Bishop of each diocese held a Consistory Court for the diocese. From about the middle of the 12th century the Chancellor or "Official" of the bishop usually presided over this court. He was the ordinary judge competent, like the judge of the court of Admiralty, to exercise all the jurisdiction inherent in his principal, except in such cases as the bishop might expressly reserve for his own hearing. In time he comes to be the permanent judge of the court, and retains office after the death, removal, or beyond the pleasure of the bishop by whom he was appointed.[1] But the bishop has never lost the right of withdrawing cases from his cognisance, if he wishes to hear them himself.[2] Similarly, the bishop sometimes delegated jurisdiction over certain parts of his diocese to his "commissary."[3] There was an appeal from the Consistory Court to the Provincial Court of the archbishop.

Each archdeacon in the diocese held a court for his archdeaconry.[4] The ordinance of William I., removing ecclesiastical pleas from the hundred court, mentions both the archdeacon and the bishop as persons who held pleas in the hundred court.[5] In its origin the office of archdeacon

[1] Ecclesiastical Commission 1832, 11, 12; Eccl. Commission 1883, 25, 26.

[2] Rex v. Tristram L.R. 1902, 1 K.B. 816.

[3] He is the official of the bishop in outlying portions of the diocese, Phillimore, Eccl. Law, 933.

[4] Ecclesiastical Commission 1883, 25, 26.

[5] Stubbs, Sel. Ch. 85, "Nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant nec causam quæ ad regimen animarum pertinet ad judicium secularium hominum adducant." Offenders are to be tried, "non secundum hundret sed secundum canones et episcopales leges."

was ministerial. He held a court as a deputy of the bishop, just as the steward held the manorial court as a deputy of his lord. "But the tendency of all such institutions is to create new jurisdictions, and, early in the 12th century, the English archdeacons possessed themselves of a customary jurisdiction."[1] It was possibly with a view to stop the encroachments of the archdeacon that the bishops adopted the plan of exercising their jurisdiction through officials. An appeal lay from the archdeacon's court to the Consistory Court.[2]

(*b*) *The Peculiar.*

The tendency in all feudal states was to vest jurisdiction in any considerable landowner. This tendency was felt in the church as well as in the state. Just as in the state the jurisdiction of the ordinary communal courts was displaced by the franchise jurisdiction, so in the church the jurisdiction of the ordinary Diocesan courts was displaced by the jurisdiction of the Peculiar Courts. One cause for the growth of these Peculiar Courts was the conflict between the bishops and their chapters, which resulted in the apportionment of the land, and jurisdiction over the land, between the bishop and the chapter. Thus both the bishops and the deans of the chapters possessed Peculiar Courts. A second cause was the exemption of the greater abbeys from episcopal jurisdiction. A third cause was a similar exemption of the king's chapels royal.[3] The variety of these Peculiar Courts can be seen from the statement of the ecclesiastical commissioners of 1832,[4] that "there are Peculiars of various descriptions in most Dioceses, and in some they are very numerous: Royal, Archiepiscopal, Episcopal, Decanal, Subdecanal, Prebendal, Rectorial, and Vicarial; and there are also some Manorial Courts." Some of these Peculiars were

[1] Ecclesiastical Commission 1883, 25, 26.

[2] It was the duty of Rural Deans to report on the manners of the clergy and laity. This rendered them necessary attendants at the episcopal visitation, and gave them at one time a small jurisdiction. Sometimes this was specially delegated to them. But this had ceased to be the case before the Reformation. The jurisdiction was absorbed by the archdeacon, Phillimore, Eccl. Law, 211-213.

[3] Ecclesiastical Commission 1883, 26.

[4] Report at p. 11. At p. 21 their number is estimated at 300. It was said that "there were some of so anomalous a nature as scarcely to admit of accurate description. In some instances these jurisdictions extend over large tracts of country, embracing many towns and parishes, as the Peculiar of the Dean of Salisbury. In others several places may be comprehended, lying at a great distance, apart from each other. Again some include only one or two parishes." Cp. Hale, Precedents, etc., xxix-xxxi. One peculiar of the abbey of St Albans extended over 26 parishes, and in 1505-1536 700 wills were there proved. In the Commissary's court for the City of London, 1496-1500, 1854 persons were cited, ibid. liii.

wholly exempt from Episcopal, and even from Archiepiscopal control. But there was an appeal from them in earlier days to the Pope; in later days to the High Court of Delegates. Recent legislation has abolished most of these courts.[1]

(*c*) *The Province.*

The archbishops of Canterbury and York possessed various Provincial Courts.[2] The Provincial Courts of the Archbishop of Canterbury were the following:—

(*a*) The court of the "Official Principal" of the archbishop (usually known as the Court of the Arches[3]) was at once the court of appeal from all the Diocesan Courts, and also a court of first instance in all ecclesiastical causes. The latter jurisdiction it attained by a series of encroachments (not without protest on the part of the bishops) analogous to the encroachments of the papal jurisdiction.[4] This jurisdiction was restrained by the Statute of Citations,[5] which put an end to the practice of citing persons outside their dioceses, except on appeals, on request of the bishop, or in case of the bishop's negligence to hear the case. "As official principal the judge was held to possess all the judicial power of the archbishop . . . he issued process in his own name, and seems in all respects to represent the archbishop in his judicial character as completely as the chief justice represented the king."[6] Whether or no this deprived the archbishop of the right to sit and act personally in his court is not quite clear.[7]

(*β*) The Court of Audience. Just as the bishop did not deprive himself of all jurisdiction by delegation to an official or commissary, so the archbishop did not originally deprive himself of all jurisdiction by delegation to the official principal. He possessed a jurisdiction concurrent with that of the Court of the Arches, which was exercised in the Court of Audience. In later times this jurisdiction was exercised by the judge of the Court of Audience.[8] At one time the arch-

[1] 1, 2 Vict. c. 106; 3, 4 Vict. c. 86; 10, 11 Vict. c. 98; Phillimore, Eccl. Law 927.

[2] The archbishop of Canterbury had also a Diocesan court for the Diocese of Canterbury which was held by a Commissary, Ecclesiastical Commission 1883, 31. As to these courts generally see ibid 31, 32, 44-46.

[3] The offices of Dean of the Arches and Official Principal became merged (4th Instit. 337). The courts of both the Official Principal and the Dean sat at St Mary-le-Bow which was built on arches. Hence the court of the Official Principal becomes known as the court of the Arches.

[4] Maitland, Canon Law, 117-120. [5] 23 Henry VIII. c. 9.

[6] Ecclesiastical Commission 1853, 31. [7] Ibid 46.

[8] Ibid 31; Phillimore, Eccl. Law, 922, 923; Coke, 4th Instit. 337, said that it possessed no contentious jurisdiction, but dealt merely with matters pro forma, e.g. the admission to benefices, etc.

bishop may have exercised a considerable part of his jurisdiction in this court. It is mentioned in a 17th century account of the Ecclesiastical Courts; but it does not appear to have been revived as a separate court after the Restoration.[1] It has now fallen into disuse. It must not be confused with the personal jurisdiction which the archbishop has over his suffragan bishops.[2]

(γ) The Prerogative Court.[3] This court was sometimes presided over by the official principal, sometimes by a special commissary. It took cognisance of the testamentary jurisdiction belonging to the archbishop. It originally sat in the archbishop's palace. It was moved, about the time of the Reformation, to Doctors' Commons. The archbishops attracted to this court most of the testamentary business of the country. Whenever a man left *bona notabilia* in more than one diocese they claimed to oust the jurisdiction of the bishop.[4] In spite of much opposition they made good their claims, which were recognised by the canons of 1604.[5]

(δ) The Court of Peculiars.[6] This Court was held by the Dean of the Arches at Bow church for the thirteen London parishes, which were exempt from the diocesan jurisdiction of the bishop of London.

(ε) The Court of the Vicar-General in which the bishops of the province are confirmed.[7]

The provincial courts of the archbishop of York were the Chancery Court, the Prerogative Court, and the Court of Audience. These courts corresponded to the Court of the Arches, the Prerogative Court, and the Court of Audience of the archbishop of Canterbury.[8]

The Public Worship Regulation Act[9] provides for the appointment by the archbishops of Canterbury and York of a single judge for their provincial courts. Such person is to hold the posts of the official principal of the Arches Court and the Chancery Court, and Master of the Faculties[10] to the archbishop of Canterbury. The person appointed must be either a practising barrister of ten years' standing, or a judge of one of the Superior Courts. He must also be a

[1] Ecclesiastical Commission 1883, 190.

[2] Read v. Bishop of Lincoln (1888) 13 P.D. 221; (1889) 14 P.D. 88. The exact nature of the jurisdiction then exercised is by no means clear, Phillimore, Eccl. Law, 73, 74. [3] Ecclesiastical Commission 1883, 31.

[4] Lyndwood 174 sub. voc. Laicis; Bl. Comm. ii 509. The value was ultimately fixed at £5. [5] Goffin, the Testamentary Executor, 69, 70.

[6] Ecclesiastical Commission 1883, 31. [7] Phillimore, Eccl. Law, 922; Rex. v. Archbp. of Canterbury L.R. 1902, 2 K.B. 503. [8] Ibid. [9] 37, 38 Vict. c. 85 § 7.

[10] I.e. The official who granted dispensations (25 Hy. VIII. c. 21) 4th Instit. 337.

member of the Church of England. He holds office during good behaviour.

There is a question whether at any time Convocation ever acted as a court.[1] There is some evidence to show that in the 14th and 15th centuries persons accused of heresy were brought before Convocation by the bishop who had cognisance over the case. But the members of Convocation did not vote on such trials. It was probably rather in the nature of a body of assessors to the archbishop than a court possessing jurisdiction. Coke, it is true, treats it as having once possessed jurisdiction in cases of heresy;[2] and a majority of the judges in *Whiston's case*[3] seemed to think that it might still possess such jurisdiction. The statute 24 Henry VIII. c. 12 made the upper house a final court of appeal in ecclesiastical causes which concerned the king. Possibly the idea was to follow up the analogy between the temporal and spiritual jurisdictions, suggested in the preamble to the statute, by giving to it the position of the House of Lords. But this jurisdiction was, as we shall see, taken away by 25 Henry VIII. c. 19. It is clear that Convocation exercises no jurisdiction at the present day.

(2) The High Court of Delegates.

In the pre-Reformation period there was practically an unlimited right of appeal to the pope in all cases which fell within the jurisdiction of the Ecclesiastical Courts. This right was fettered to a slight degree by the rules made by the pope himself,[4] and by the statutes of præmunire, in those cases in which the civil tribunals claimed exclusive jurisdiction. But where it existed the system of appeals and rehearings was, or might be, never ending. "Not only might a matter in dispute be treated over and over again, delegacy superseding delegacy, and appeal being interposed on every detail of proceeding one after another, but even after a definitive decision a question might be reopened and the most solemn decision be reversed on fresh examination. On this system of rehearing there was practically no limit, for, however solemn the sanction by which one pope bound himself and his successors, it was always possible for a new pope to permit the introduction of new evidence or a plea of exceptions. In this way the Roman Court remained a resource

[1] Ecclesiastical Commission 1883, 45, 46, 52-69; Read v. Bishop of Lincoln (1889) 14 P.D. 114-117.

[2] 4th Instit. 322; cp. Hale, 1 P.C. 390; Gibson, Codex, 353 n.g.

[3] (1712) Brod. and Free 325.

[4] Ecclesiastical Commission 1883, 30; Engl. Hist. Review xvi 40, 41.

for ever open to litigants who were able to pay for its services, and the apostolic see avoided the imputation of claiming finality and infallibility for decisions which were not indisputable."[1]

The Statute for the restraint of appeals[2] prohibited all appeals to Rome, and provided that certain[3] appeals should go from the archdeacon to the bishop, and (within 15 days) from the bishop to the courts of Arches or Audience, and from those courts to the archbishop himself. His decision was final except in cases touching the king. In that case there was an appeal from any of the Ecclesiastical Courts to the upper house of Convocation. This act was superseded by one passed in the following year which provided a new court of appeal for all ecclesiastical causes.[4] The court created by this act becomes known as the High Court of Delegates. The act provided as follows:—"For lack of justice at or in any of the courts of the archbishops of this realm, or in any of the king's dominions, it shall be lawful for the parties grieved to appeal to the King's Majesty in the King's court of Chancery; and that upon every such appeal a commission shall be directed under the Great Seal to such persons as shall be named by the King's Highness his heirs and successors, like as in case of appeal from the Admiral's court, to hear and definitively determine every such appeal, and the causes concerning the same. And that such judgment as the said commissioners shall make and decree . . . shall be good and effectual, and also definitive."[5] An appeal to the same body was provided from such peculiar jurisdictions as were exempt from episcopal or archiepiscopal control.[6]

A person desiring to appeal addressed a petition to the crown in Chancery, on which a commission of appeal issued appointing certain commissioners. If any of these commissioners died pending the appeal, if they were equally divided, or if, for any reason, it was desired to increase the strength of the court, a "commission of adjuncts" issued, adding certain persons to the court. It followed that the court was differently constituted for the hearing of each appeal.[7]

Henry VIII.'s statute declared the judgment of the

[1] Ecclesiastical Commission 1883, 30. [2] 24 Henry VIII. c. 12.
[3] Causes testamentary, causes of matrimony and divorce, rights of tithes, oblations and obventions. This did not apparently include heresy.
[4] 25 Henry VIII. c. 19. Repealed 1, 2 Phil. and May, c. 8. Revived 1 Eliza. c. 1 with a saving for certain pending appeals to the Pope. [5] § 4.
[6] § 6. [7] Rothery's Return (Parliamentary Papers 1867, lvii 75) x-xii.

Delegates to be final. But it was decided by the Elizabethan lawyers that the crown could, like the Pope, issue a commission of Review, to hear the whole case over again.[1]

The Court was not a court of first instance. It heard appeals from the provincial courts, and from the exempt peculiar jurisdictions. It did not control the court of High Commission, the abolition of which necessarily added to the number of cases heard before it.[1]

The crown had an absolute discretion as to the persons to be appointed. But, as the lawyers of Doctors' Commons were the only lawyers acquainted with canon or civil law and procedure, certain of them were usually included in the commission. In some of the earlier cases bishops and judges were included. In the 18th century the bishops are rarely included, and are at length entirely excluded.[2] It was stated in 1832 that in ordinary cases the delegates were three puisne judges and three civilians, though, in special cases, temporal peers, and other judges might be added.[3]

The Court was not satisfactory. It was a shifting body. No general rules of procedure could be established. It did not as a rule give reasons for its decisions. Its members were only paid a guinea a day; and consequently it was usually composed of the junior civilians. On them, the judges of the Common Law Courts, appointed as delegates, were obliged to rely for their law.[4]

In consequence of the dissatisfaction felt at the working of this tribunal the Ecclesiastical Commission of 1832, in a special report, recommended the transfer of its jurisdiction to the Privy Council. This recommendation was carried out by 2, 3 Will. IV. c. 92.[5] The jurisdiction is now exercised by the Judicial Committee of the Privy Council created by 3, 4 Will. IV. c. 41.[6]

(3) The Court of High Commission.

The Court of High Commission was created, as we have seen, under powers given to the crown by the Act of

[1] Ecclesiastical Commission 1883, 47.
[2] Rothery's Return xx-xxii.
[3] Ecclesiastical Commission (1832) Special Rep. 6.
[4] Ibid 6, 159, 160 (Evidence of Joseph Phillimore).
[5] But a recourse to the Delegates by the special provision in the patent of a Colonial Bishop was still possible, Rothery's Return 100.
[6] Above 293. The hearing of Ecclesiastical cases was not actually mentioned. It was assumed that this jurisdiction passed, and this was recognised by the Church Discipline Act, 3, 4 Vict. c. 86 § 16.

Supremacy.[1] The first commission was issued in 1559 to Parker, Grindal, and seventeen others. Their duties were to enforce the Acts of Supremacy and Uniformity, and to deal generally with ecclesiastical offences. They could conduct their enquiries with or without a jury. They could summon persons on suspicion. They could examine any one on oath.[2] The later commissions are all formed on the model of the first. But they show a tendency to increase the jurisdiction of the commissioners. They were entrusted with the acts for the protection of the Establishment passed later in the reign. The qualifying clause, "according to the authority and power limited, given, and appointed by any laws or statutes of the realm," which is inserted in the earlier commissions, was omitted in 1596. The authority given to the commissioners was not diminished under James I. and Charles I. In 1613 they were empowered to execute the Star Chamber rules as to the censorship of the press, and to hear complaints of wives against husbands. In the commission of 1625 it was provided that, during the session of Convocation, their powers should be exercised only by the bishops in Convocation. But this clause was dropped in the following reign.[3]

The Court entertained all important causes of doctrine and ritual. During its existence not many of these causes came before the Court of Delegates. But the causes which it most frequently entertained were proceedings in respect of immorality and misconduct of the clergy and laity, and proceedings in respect of recusancy and non-conformity. It did not supersede the ordinary Ecclesiastical Courts. It exercised a concurrent jurisdiction.[4]

The Commissioners could exercise their powers throughout England. But, as a rule, separate commissions were issued for the provinces of York and Canterbury, and sometimes for separate dioceses.[5] Their powers were, as we have seen,

[1] 1 Eliza. c. 1 § 8; Ecclesiastical Commission 1883, 49, 50.

[2] Nothing excited more odium than the "ex officio oath." "This procedure, which was wholly founded on the canon law, consisted in a series of interrogations, so comprehensive as to embrace the whole scope of clerical uniformity, yet so precise and minute as to leave no room for evasion, to which the suspected party was bound to answer upon oath," Hallam, C.H. i 202. It was abolished by 13 Car. II. St. 1, c. 12 § 4.

[3] Prothero, Documents, xl-xlv 227-241.

[4] Ecclesastical Commission 1883 50; cp. Cases in the Courts of Star Chamber and High Commission (C.S.); Stephen, H.C.L. ii 420-427.

[5] Rymer, Fœdera, xvi 291, 386.

wide and indefinite; and, except in the commissions of 1611, 1613, 1620, and 1625, their exercise was subject to no appeal.[1]

A strong court of this nature was necessary to support the Established Church against its Puritan and Catholic enemies.[2] It was not at first unpopular. But, as Mr Prothero points out, "The efficiency of the system ... and the general results produced, depended mainly on the views and characters of the archbishops and their episcopal colleagues, on whom fell almost all the burden of carrying the commission into effect."[3] In the Stuart period, as we have seen, the state was divided into two camps.[4] Just as the supporters of the Council, the Admiralty, and the court of Chancery, relying on the prerogative, opposed the common lawyers, who led the parliamentary opposition; so the supporters of the State Church relied upon the court, which exercised the Royal Supremacy, in their efforts against sectaries of all kinds. The Puritans necessarily found themselves in alliance with the common lawyers; and in this manner a religious element was imported into the political and legal controversy, which was destined to prove, for an interval, fatal to the constitution. Though Coke had, in *Caudrey's case*,[5] unduly magnified the Royal Supremacy, he found, in his Fourth Institute, many reasons for showing that the Court of High Commission had exceeded its powers. He denied it the right to fine and imprison.[6] He commented upon the lengthy provisions of the more recent commissions, and the denial of all right to appeal.[7] He contended that it should deal only with important cases.[8] The common lawyers followed his lead. The action of the court was fettered by writs of prohibition. Persons imprisoned by it were released by writs of habeas corpus.[9] It was attacked by Parliament in 1610,[10] and necessarily fell with the victory of the Parliamentary party in 1640.[11] The same act abolished all the other Ecclesiastical Courts. The court of High Commission was not restored at the Restoration with the other Ecclesiastical Courts.[12]

[1] The Commissions of those years provided for a commission of review.
[2] Prothero, Documents, xlvi; Hale, Precedents, etc., xlviii, xlix.
[3] xlvi. [4] Above 290, 291.
[5] 5 Rep. 1 (1591) at p. 8 a (and cp. Moore 755) it was said that such a commission would have been lawful by virtue of the Royal Supremacy, apart from the act of Supremacy. James II.'s lawyers would probably have justified their action in setting up a new court of High Commission on some such ground as this, Stillingfleet, Eccl. Cases, ii 200, 201.
[6] 4th Instit. 326. Cp. Stephen, H.C.L. ii 416-418.
[7] Ibid 326, 328. [8] Ibid 331. [9] Ibid 332-334.
[10] Prothero, Documents, 302-305. [11] 16 Car. I. c. 11.
[12] 13 Car. II. St. 1 c. 12 § 3.

(4) The Statutory Courts of the 19th century.

Certain statutes of the last century have provided new and more convenient procedure, and, in some cases, new courts, for the exercise both of criminal and civil jurisdiction.

The procedure of the Ecclesiastical Courts had become so dilatory and expensive that much difficulty had been found in bringing to justice clergy guilty of immoral conduct. The ecclesiastical commissioners reported in 1832 that, "some cases of a flagrant nature, which have occurred of late years, have attracted the attention of the Public to the corrective Discipline of the Church, as administered by the Ecclesiastical Courts, and have at the same time exhibited in a strong light the inconveniences which have attended the application of the ordinary process of the Courts to such suits; namely, an injurious delay in effecting the desired object of removing Ministers of immoral and scandalous lives from the administration of the sacred offices of the Church; and the large expense incurred in such suits."[1]

The Church Discipline Act of 1840[2] was passed to deal with the cases of clerks "who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws."[3] It enacted that no criminal suits be instituted otherwise than according to procedure provided by the Act.[4]

In cases where a clerk is charged with an offence the bishop, may, on the application of a complainant, or of his own motion, issue a commission to five persons to inquire. They must report to the bishop whether there are prima facie grounds for instituting proceedings.[5] With the consent of the party accused, the bishop may pronounce sentence without further proceedings.[6] If he does not consent, articles are drawn up against the party accused.[7] If he admits the truth of the articles the bishop (or his commissary specially appointed for that purpose) may pronounce sentence.[8] If not, either the bishop assisted by three assessors may hear the case, or the bishop may send the case to be tried by the court of the Province.[9] But the letters of request for this purpose must have been sent before the filing of the articles.[10] An appeal is provided to the court of the Province and to the Privy Council.[11] In order to avoid the double appeal,

[1] At p. 56.
[2] 3, 4 Vict. c. 86.
[3] § 3.
[4] § 23.
[5] §§ 3, 4, 5.
[6] § 6.
[7] § 7.
[8] § 9.
[9] §§ 11, 13.
[10] § 13.
[11] § 15.

most cases were sent by the bishop to the court of the Province in the first instance.[1]

The provisions of the Act did not apply to persons instituting suits to establish a civil right.[2] They did apply to all exempt and peculiar places, except those belonging to bishoprics or archbishoprics.[3] Pending the enquiry or trial, the bishop was empowered to inhibit the party accused from continuing to perform the services of the church.[4] This act has for most purposes been repealed, in respect of offences committed by clergymen, which come within the provisions of the Clergy Discipline Act of 1892.[5]

The Act provides that a clergyman convicted of treason, certain felonies and misdemeanours, or adultery, or against whom a bastardy order, or a decree for judicial separation has been made, shall ipso facto forfeit his preferment within twenty-one days.[6] It provides that a clergyman may be prosecuted, in the Consistory Court of his diocese, by any of his parishioners, if he is convicted by a temporal court of an act (other than those named above) constituting an ecclesiastical offence, or, if he "is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality, and not being a question of doctrine or ritual."[7] The bishop may in all cases disallow the prosecution if he sees fit. The trial is before the bishop's chancellor; but, if either party so requires, questions of fact must be decided by five assessors.[8] There is an appeal on any question of law, and, with the leave of the appellate court, on any question of fact, either to the court of the Province or to the Privy Council.[9]

In 1874 the Public Worship Regulation Act[10] gave to the existing Ecclesiastical Courts a new machinery for the trial of offences against the ceremonial law of the church. An archdeacon, a churchwarden, or any three parishioners of the archdeaconry or parish within which a church or burial ground is situate, may represent to the bishop that unlawful additions have been made in the fabric or ornaments of the

[1] Ecclesiastical Commission 1883, xlvi.
[2] § 19. [3] § 22. [4] § 14.
[5] 55, 56 Vict. c. 32 § 14. 3. The sections of the Church Discipline Act, which are saved, are contained in the schedule. They relate to the definition of terms; power of the bishop to pronounce sentence at once with the consent of the parties; power of the bishop to inhibit the accused party pending enquiry; witnesses to be examined on oath; power as to exempt or peculiar places.
[6] § 1. [7] § 2; cp. Sweet v. Young L.R. (1902) P. 37. [8] § 2, a, c, e. [9] § 4.
[10] 37, 38 Vict. c. 85. Cp. Ecclesiastical Commission 1883 xlvii-xlix; and Green v. Lord Penzance L.R. (1881) 6 A.C. 657.

church, or that there has been use of unlawful ornaments, or neglect to use prescribed ornaments, or that there has been failure to comply with the rules of the book of Common Prayer, as to the conduct of services.[1] The bishop may, if he pleases, refuse to institute proceedings.[2] If he thinks that proceedings should be taken, he may himself, with the consent of both parties, deal finally with the case.[3] If they do not consent, the case is heard by the judge of the court of the Province.[4] From his decision an appeal lies to the Privy Council.[5]

The working of this act has not been found to be altogether satisfactory. The ecclesiastical commissioners of 1883 reported that it added little to the powers conferred on the Court of the Arches by the Church Discipline Act; and that, in practice, proceedings taken under it were no more convenient than proceedings taken under the earlier act.[6]

The Benefices Act of 1898[7] gave to the bishop in certain cases[8] the power to refuse to institute a person presented to a benefice. An appeal from such refusal lies to the archbishop of the Province, and to a judge of the supreme court, nominated pro hac vice by the Lord Chancellor.[9] The judge decides any question of law, and finds the facts. The archbishop gives judgment as to whether the facts so found renders the presentee unfit for the duties of the benefice.[10] From this decision there is no appeal.[10] The same tribunal is given a jurisdiction in cases where a bishop has superseded and inhibited an incumbent, by reason of negligent performance of his duties. The incumbent can in such cases appeal to this tribunal. The judge decides whether there has been negligence. The archbishop, if negligence is found, decides whether it is good ground for the inhibition.[11]

(iii) The jurisdiction of the Ecclesiastical Courts.

In the 12th century the Ecclesiastical Courts claimed to exercise wide jurisdiction. (1) They claimed criminal jurisdiction in all cases in which a clerk was the accused, a jurisdiction over offences against religion, and a wide corrective jurisdiction over clergy and laity alike "pro salute animæ." A branch of the latter jurisdiction was the claim to enforce all promises made with oath or pledge of faith. (2) They claimed a wide jurisdiction over matrimonial and testamentary causes. Under the former head came all questions of marriage, divorce, and legitimacy; under the latter came grants

[1] § 8. [2] § 9. [3] § 9. [4] § 9.
[5] § 9. [6] At p. xlix. [7] 61, 62 Vict. c. 48. [8] §§ 2, 3. 1.
[9] § 3. 1. [10] § 3. 2. [11] § 9.

of probate and administration, and the supervision of the executor and administrator. (3) They claimed exclusive cognisance of all matters which were in their nature ecclesiastical, such as ordination, consecration, celebration of service, the status of ecclesiastical persons, ecclesiastical property such as advowsons, land held in frankalmoigne, and spiritual dues.

These claims were at no time admitted by the state in their entirety. In course of time most of these branches of jurisdiction have been appropriated by the state. All that is practically left at the present day is a certain criminal or corrective jurisdiction over the clergy, and a certain jurisdiction in respect of some of the matters contained under the third head. The history of this jurisdiction we must now sketch.

(1) Criminal and corrective jurisdiction.

(*a*) *Criminal jurisdiction.*

In the 12th century the Church claimed that all clerks should be exempt from any kind of secular jurisdiction, and, in particular, that "criminous clerks" should be subject to the jurisdiction of the Ecclesiastical Courts alone.[1] In answer to this claim Henry II., in 1164, propounded the scheme contained in the third clause of the Constitutions of Clarendon.[2] He contended that that scheme represented the laws in force in the time of Henry I. According to the clause the clerk is accused before the temporal court. He must there plead his clergy. He will then be sent to the Ecclesiastical Court for trial, and a royal officer will attend the trial. If he is found guilty and degraded the royal officer will bring him back, as a layman, to the temporal court to suffer the layman's punishment. Becket objected to this scheme on three grounds:—(1) A clerk ought not to have been accused before the temporal court; (2) a royal officer ought not to have been present in the Ecclesiastical Court; (3) further punishment by the lay court involved an infringement of the rule that no man ought to be punished twice for the same offence. The first two of these objections were good according to the canon law. As to the third the canon law was not at that date clear; but the principle for which Becket contended was shortly afterwards condemned by Innocent III.[3]

[1] P. and M. i 430-440; Maitland, Canon Law, 132-147.

[2] Sel. Ch. 138, Clerici rettati et accusati de quacunque re, summoniti a justicia regis venient in curiam ipsius, responsuri ibidem de hoc unde videbitur curiæ regis quod ibidem sit respondendum; Et in curia ecclesiastica, unde videbitur quod ibidem sit respondendum; ita quod justicia regis mittat in curiam sanctæ ecclesiæ ad videndum qua ratione res ibi tractabitur. Et si clericus convictus vel confessus fuerit, non debet de cetero eum ecclesia tueri.

[3] P. and M. i 437, 438 and notes.

The results of Becket's murder were curious. The temporal courts maintained their claim to bring the criminous clerk before them. They abandoned their claim to punish the degraded clerk. This abandonment gave rise to the Privilege or Benefit of Clergy.

Originally the Benefit of Clergy meant that an ordained clerk charged with felony could be tried only in the Ecclesiastical Court. But, before the end of Henry III.'s reign, the king's court, though it delivered him to the Ecclesiastical Court for trial, took a preliminary inquest as to his guilt or innocence.[1] The Ecclesiastical Court then tried the accused by the obsolete process of compurgation.[2] The court could sentence to degradation, imprisonment or whipping. The Benefit of Clergy did not apply to high treason, to breaches of the forest laws, to trespasses or misdemeanours.[3]

In course of time the Benefit of Clergy entirely changed its nature. It became a complicated series of rules exempting certain persons from punishment for certain criminal offences.[4]

(1) The class of persons who could claim it was enlarged, and distinctions were drawn between them. In 1350[5] it was enacted that secular as well as religious clerks should have the privilege. After this statute the privilege became extended to all who could read. In 1705[6] even this requirement was abolished. But traces of the time when the privilege was really a privilege of the clergy were long maintained in the rules that the "bigamus" (*i.e.* the men twice married or married to a widow) and a woman, could not claim it. The first exception lasted till 1547,[7] the second till 1692.[8]

In 1487[9] it was enacted that all persons, except those actually in orders, should, if convicted of a clergyable felony, be branded and disabled from claiming the privilege a second time. In 1547[10] a peer, even if he could not read, was given the same privilege as a person actually in orders.

[1] Bracton, f. 123 b, states the old practice; Britton, i 27, the new. Coke, 2nd Instit. 164, assigns the change to Stat. West I. c. 2 (1275). The rolls show that the change had taken place before the Statute, P. and M. i 425 n. 2.

[2] Above 138-140. Hobart, Rep. 291 in 1620 described it as "turning the solemn trial of truth by oath into a ceremonious and formal lie."

[3] P. and M. 429, 430.

[4] For the detailed history of the process see Stephen, H.C.L. i 458-472; cp. Hale, 2 P.C. 323-390; and Bl. Comm. iv 358-367.

[5] 25 Ed. III. Stat. 3 c. 4. [6] 5 Anne, c. 6 § 6. [7] 1 Ed. VI. c. 12 § 16.

[8] 3 Will. and Mary c. 9 § 6.

[9] 4 Henry VII. c. 13. The distinction was abolished 28 Henry VIII. c. 1 § 7, but restored by 1 Ed. VI. c. 12 § 14.

[10] 1 Ed. VI. c. 12 § 14.

(2) Changes were made in the method and consequences of successfully pleading clergy.

It had been found better for the prisoner not to plead his clergy at once, but to plead to the indictment, and take his trial, as he could then challenge the jury, and there was always a chance that he might be acquitted. If he was convicted he could then plead his clergy.[1]

In 1576[2] the necessity for proving innocence in the Ecclesiastical Court by compurgation was abolished. But the judges could imprison persons (not being peers or clerks in orders), who had taken the Benefit of Clergy, for any term not exceeding a year. In 1717[3] it was enacted that persons convicted of clergyable larcenies (not being peers or clerks in orders) should be transported for seven years.

(3) The number of offences not clergyable were gradually increased and, when new offences were created, they were generally stated to be without Benefit of Clergy.

We have seen that at common law, high treason, breaches of the forest laws, and misdemeanours were not clergyable. On the other hand all felonies except insidiatio viarum, and depopulatio agrorum were clergyable.[4] By successive statutes the following offences were deprived of the benefit of clergy: —Petty treason, murder in churches or highways, and later all murders, certain kinds of robbery and arson (except in the case of clerks in orders), piracy, burglary and housebreaking if any one was in the house and put in fear, horse-stealing, rape, abduction with intent to marry, stealing clothes off the racks, or stealing the king's stores.[5]

In 1827[6] the Benefit of Clergy was abolished.

(*b*) *Corrective jurisdiction.*

The Ecclesiastical Courts exercised a wide and vague control over the religious beliefs and the morals of clergy and laity alike. The state regarded itself as under a duty to enforce obedience to the laws of God. The Ecclesiastical Courts were the instruments through which the state acted. The result was "a system of moral government emanating from the

[1] Carter, Legal History, 200. The new practice was also advantageous to the revenue, as, if convicted after pleading to the indictment, the prisoner's goods were absolutely forfeited; whereas if he were convicted without pleading to the indictment, they were restored if he successfully made his purgation.

[2] 18 Eliza. c. 7 §§ 2, 3.

[3] 4 Geo. I. c. 11.

[4] Stephen, H.C.L. i 464.

[5] Stephen, H.C.L. i 464-466.

[6] 7, 8 Geo. IV. c. 28 § 6. This act did not repeal 1 Ed. VI. c. 12. There was consequently a doubt whether even after this act of 7, 8 Geo. IV. peers might not claim clergy. The doubt was set at rest by 4, 5 Vict. c. 22, which put peers accused of crimes on the same footing as commoners.

episcopal order, and forming that part of the pastoral care, which is fully expressed in the Consecration Service, when the bishop promises that such as be unquiet, disobedient, and criminous within his diocese, he will correct and punish, according to such authority as he has by God's word, and as to him shall be committed by the ordinance of this realm."[1]

We may divide the extensive jurisdiction thus exercised by the Ecclesiastical Courts into two heads:—(α) offences against religion, (β) offences against morals.

(α) Offences against religion.

Of such offences the most important is heresy. It was regarded as a species of high treason against the church. "A man who did not begin by admitting the king's right to obedience and loyalty, put himself out of the pale of the law. A man who did not believe in Christ or God put himself out of the pale of human society; and a man who on important subjects thought differently from the church, was on the high road to disbelief in Christ and in God, for belief in each depended ultimately upon belief in the testimony of the church."[2] The infrequency of heresy, down to the time of Wicklif and the Lollards, makes it somewhat uncertain in what manner the Ecclesiastical Courts could deal with it. The case of the deacon, who was burnt at Oxford because he apostatized for the love of a Jewess, is the only undoubted case mentioned in the older books.[3] But heresy was known on the continent, and there is no doubt that the canon law distinctly laid it down that the penalty was death by burning.[4] It is to this rule of the canon law that Lyndwood refers as authority for the proposition the heretics must be burnt.[5] The accounts we have of the story of the deacon and the Jewess are too

[1] Hale, Precedents, lvii.

[2] Stephen, H.C.L. ii 438. See the Litany, "Sedition, privy conspiracy, and rebellion," are co-ordinated with "false doctrine, heresy and schism."

[3] Maitland, Canon Law, 158-175; Bracton ff. 123 b, 124. He explains that, as a rule, degradation is a sufficient punishment for the clerk. But if convicted of apostacy he must be burnt, "secundum quod accidit in concilio Oxoniensi celebrato a bonæ memoriæ S. Cantuariensi archiepiscopo, de quodam diacono qui se apostatavit pro quadam Judæa, qui cum esset per episcopum degradatus, statim fuit igni traditus per manum laicalem." Cp. Hale 1 P.C. 394 for two other doubtful cases.

[4] Lyndwood 293 refers to a decree of Frederic II., which had been approved by the pope, and incorporated into the Canon Law as c. 18 in Sexto, 5. 2.

[5] 293 sub voc. pœnas in jure expressas. "Sed hodie indistincte illi qui per judicem ecclesiasticum sunt damnati de Heresi, quales sunt pertinaces et relapsi, qui non petunt misericordiam ante sententiam, sunt damnandi ad mortem per sæculares potestates, et per eos debent comburi seu igne cremari, ut patet in constitutione Frederici quæ incipit *ut commissi* § *item mortis* . . . quæ sunt servanda ut patet e. ti. *ut inquisitionis.*"

obscure to make it an authority for any distinct legal proposition. But the case of Sawtre (1400) is a clear case in which the rule of the canon law was applied. He was convicted of heresy before the bishop of Norwich and recanted his heresy. He fell again into heresy, and was condemned by the archbishop and his provincial council, as a relapsed heretic. On this conviction the king issued a writ de hæretico comburendo.[1]

This case clearly shows that the common law recognised the rule of the canon law, and that therefore such a writ lay at common law. It was not till a fortnight after this writ was issued that the act 2 Henry IV. c. 15 was passed with a view to strengthen the hands of the law in dealing with heresy. That act provides that persons "defamed or evidently suspected" of heresy shall be detained in the bishop's prison till they abjure. If they decline to abjure, or relapse, they are to be burnt. By a later act of 1414[2] all officials "having governance of people" were directed to take an oath to use their best endeavours to repress heresy. They were to assist the Ecclesiastical Courts whenever required. The justices of assize and the justices in quarter sessions were to receive indictments of heresy, and to deliver over the persons indicted to be tried by the Ecclesiastical Courts.

The act thus gave the clergy power to arrest and imprison by their own authority, and to requisition the aid of the civil power in so doing.[3]

Henry VIII.'s legislation necessitated some changes in the law relating to heresy. By an act of 1533[4] it was declared that speaking against the authority of the pope, or against spiritual laws repugnant to the laws of the realm, should not be heresy. The act of 2 Henry IV. c. 15 was repealed, and the bishops were thereby deprived of the power to arrest and imprison on suspicion. The tourn and the leet, as well as the justices of assize and the quarter sessions, were given power to receive indictments of heresy. Thus an accusation for heresy must, as a rule, begin by an indictment before some recognised temporal court. The result was a great cessation in prosecutions for heresy.[5] The act of the Six Articles[6] (1539) made the holding of certain opinions felony; and it was provided that commissions should issue to the bishop and other persons to inquire into these offences four times a year.

[1] Stephen, H.C.L. ii 445-447; Maitland, Canon Law, 176, 177.
[2] 2 Henry V. St. 1 c. 7.
[3] Stephen, H.C.L. ii 450.
[4] 25 Henry VIII. c. 14.
[5] Stephen, H.C.L. ii 455.
[6] 31 Henry VIII. c. 14.

In Edward VI.'s reign all the previous legislation touching heresy was repealed. The common law was restored.[1] But the common law was the law settled by Sawtre's case.[2] The result was curious. Persons might be burnt for heresy in a Protestant country under the authority of the papal canon law.

Elizabeth's Act of Supremacy authorised the establishment of the court of High Commission for the trial of ecclesiastical offences.[3] But it considerably limited their powers to declare opinions heretical.[4] If, however, a man was convicted of heresy by the court he might be burnt according to the rule of the common law. Heretics were burnt in 1575 and 1612. In the latter case Coke's opinion was against the legality of the issue of the writ de hæretico comburendo, but four judges were against him.[5] In 1677[6] "all punishment of death in pursuance of any ecclesiastical censures" was abolished. But the act contained a proviso that nothing in it shall "take away or abridge the jurisdiction of Protestant archbishops or bishops, or any other judges of any Ecclesiastical Courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions, but that they may proceed to punish the same according to his Majesty's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures not extending to death." Many of these offences can now be punished in the temporal courts: but by virtue of this saving it is probably theoretically possible that persons guilty of such offences may be excommunicated, and imprisoned for six months by an Ecclesiastical Court.

(β) Offences against morals.

The Ecclesiastical Courts exercised a wide disciplinary control over the moral life of the members of the church. The criminal precedents published by Archdeacon Hale in 1847 illustrate the nature of the jurisdiction. They consist of a collection of extracts from the Act Books of six Ecclesiastical Courts between the years 1475 and 1640. The offences dealt with are varied and numerous. They com-

[1] 1 Ed. VI. c. 12. [2] 1550, Joan Boucher was burnt as a heretic.
[3] 1 Eliza. c. 1 § 8.
[4] § 20. They could adjudge nothing heresy but such as had been adjudged to be heresy "by the authority of the canonical scriptures, or by the first four general councils, or any of them, or by any other general council wherein the same was declared heresy by the express or plain words of the said canonical scriptures, or such as hereafter shall be . . . determined to be heresy by the High Court of Parliament of this realm with the assent of the Clergy in their Convocation." As Stephen says, H.C.L. ii 461, this meant that no one could be declared heretic, because of his views as to the Catholic and Protestant controversy, unless he was anabaptist. [5] Rep. xii 93. [6] 29 Car. II. c. 9.

prise, adultery, procuration, incontinency, incest, defamation, sorcery, witchcraft, behaviour in church, neglect to attend church, swearing, profaning the Sabbath, blasphemy, drunkenness, haunting taverns, heretical opinions, profaning the church, usury, ploughing up the church path.[1] The methods by which the Ecclesiastical Courts proceeded were well calculated to produce evidence of the commission of such offences. They might proceed:—(1) By inquisition. In this case the judge was the accuser. He might proceed upon his own personal knowledge or on common fame. As a rule the apparitors or other officers supplied the information. They used their powers in many cases in the most corrupt manner. Chaucer probably represented the popular view when he makes the Friar say of the "sompnour"—

> "A sompnour is a renner up and doun
> With maundementz for fornicacioun,
> And is y-bete at every tounes ende."

Or (2) they might proceed on the accusation of some individual who was said to "promote the office of judge." Or (3) they might proceed by Denunciation. In that case the person who gave the information was not the accuser, nor subject to the conditions attaching to this position.[2]

[1] Cp. Chaucer's summary in the Friar's Tale:—

> "Whilom there was dwellyng in my countré
> An erchedeken, a man of gret degré,
> That boldely did execucioun,
> In punyschyng of fornicacioun,
> Of wicchecraft, and eek of bauderye,
> Of diffamacioun, and avoutrie,
> Of chirche-reves, and of testamentes,
> Of contractes, and of lak of sacraments,
> And eek of many another maner crime,
> Which needith not to reherse at this tyme;
> Of usur, and of symony also;
> But certes lecchours did he grettest woo;
> They schulde synge, if that they were hent;
> And smal tythers they were fouly schent,
> If eny persoun wold upon hem pleyne,
> Ther might astert him no pecunial peyne.
> For smale tythes and for smal offrynge,
> He made the people pitously to synge.
> For er the bisschop caught hem in his hook,
> They weren in the archedeknes book:
> And hadde thurgh his juredicciouu
> Power to have of hem correccioun.

In vol. xxv (11-56) of the Archælogia Cantiana there is an account of various presentments made between the reigns of Elizabeth and Anne in certain parishes in the Deanery of Westbere. They are of the same general character as those collected by Hale. The extracts after the Restoration deal as a rule simply with ecclesiastical matters.

[2] Hale, Precedents, lvii, lviii.

This system was, as Stephen says, "in name as well as in fact an inquisition, differing from the Spanish Inquisition in the circumstances that it did not . . . employ torture, and that the bulk of the business of the courts was of a comparatively unimportant kind."[1] We can see, from the number of cases tried, that up to 1640 the system was in full vigour. In the archdeacon of London's court, between Nov. 27, 1638, and Nov. 28, 1640, there were 30 sittings and 2500 causes entered. If each person attended on two or three court days the number of persons prosecuted would be less than this. But the records show that 1800 people were before the court in that time, "three-fourths of whom, it may be calculated, were prosecuted for tippling during Divine Service, breaking the Sabbath, and non-observance of Saints days."[2]

It is not difficult to see why the Parliament in 1640 abolished the Ecclesiastical Courts. A system which enabled the officers of inferior courts to enquire into the most private affairs of life upon any information was already out of date.

The ordinary Ecclesiastical Courts and their jurisdiction were restored in 1661;[3] and there is no legal reason why at the present day they should not try cases of adultery or fornication. But between the Restoration and the present day their jurisdiction has been much curtailed, and has finally altered its shape, not only because men's ideas upon methods of moral government have changed, but also because the state has interfered to punish offences which were once left to the Ecclesiastical Courts. In 1533 unnatural offences, and in 1541 witchcraft were made felonies.[4] In 1603 bigamy was made felony.[5] In 1823 jurisdiction in cases of perjury was taken away from the Ecclesiastical Courts.[6] In 1855[7] suits for defamation, and in 1860[8] suits against laymen for brawling in church were similarly removed. It was a principle laid down by Coke, as an established maxim in law, "that where the common or statute law giveth remedy in foro seculari (whether the matter be temporal or spiritual), the conusance of that cause belongeth to the king's temporal courts only; unless the jurisdiction of the spiritual courts be saved, or allowed by the same statute, to proceed according to the ecclesiastical laws."[9] The result is that while the jurisdiction

[1] H.C.L. ii 402. [2] Hale, Precedents, liv. [3] 13 Car. II. St. 1 c. 12.
[4] 25 Henry VIII. c. 6; 33 Henry VIII. c. 8. Stephen, H.C.L. ii 430, says that the reason why incest in its worst form is not a crime is probably because it was, and still is, an ecclesiastical offence. [5] 1 Jac. I. c. 11.
[6] 4 Geo. IV. c. 76. [7] 18, 19 Vict. c. 41. [8] 23, 24 Vict. c. 32.
[9] Co. Litt. 96 b; cp. Phillimore v. Machon (1876) L.R. 1 P.D. 481.

of the Ecclesiastical Courts over certain kinds of immorality still in theory remains, in practice these courts are only called upon to act in the case of the clergy. In this respect, as we have seen, their jurisdiction has been improved.[1] They are no longer "courts of law having authority over the sins of all the subjects of the realm." They are "courts for enforcing propriety of conduct upon the members of a particular profession."[2]

The Ecclesiastical Courts at one time claimed a species of corrective jurisdiction in all cases in which there had been fidei læsio. This, if conceded, would have given them an extensive jurisdiction over contract. We have seen that in the 14th century the temporal courts stopped the exercise of this species of jurisdiction.[3]

(2) Matrimonial and Testamentary causes.

(*a*) Matrimonial.

The Ecclesiastical Courts had, certainly from the 12th century, undisputed jurisdiction in matrimonial causes. Questions as to the celebration of marriage, as to the capacity of the parties to marry, as to the legitimacy of the issue, as to the dissolution of marriage were decided by the Ecclesiastical Courts administering the canon law.[4] The common form of the writ of prohibition always alleged that the matter over which jurisdiction had been assumed was neither matrimonial nor testamentary.[5]

The temporal courts had no doctrine of marriage. But questions as to the validity of marriage might come incidentally before them. Was a woman entitled to dower? Is the child of a marriage entitled to inherit English land? What if the parties, ignorant of any impediment, marry in good faith and have issue? What if the jurors in an assize find facts from which a marriage can be presumed? In answering some of these questions the temporal courts often laid down rules about marriage which were at variance with the rules of the canon law. The canon law laid it down clearly that mere consent—without any further ceremony, and without cohabitation—sufficed. The temporal courts laid more stress upon some ceremony, or some notorious act. The death-bed marriage was not regarded as sufficient to establish a claim to dower. A child legitimated per subsequens matrimonium could not inherit English land. If

[1] Above 378-380.

[2] Stephen, H.C.L. ii 437.

[3] Constitutions of Clarendon c. 15; Circumspecte Agatis, 13 Ed. I.; P. and M. ii 195-200; above 242.

[4] Glanvil vii 13, 14; P. and M. ii 365, 366.

[5] Bracton f. 407 b.

the parties were ignorant of the impediment, and later whether or not they were ignorant, the children were legitimate, if born before divorce, or, later, if their parents were not divorced. For the purposes of an assize a de facto marriage would be recognised.[1] It was probably a consideration of these rules of the temporal courts, adjudicating on marriage, or rather on the reputation of marriage, for very special purposes, which led the House of Lords in 1843[2] to assert, in defiance of the canon law of the Middle Ages, that the presence of an ordained clergyman was necessary to constitute a valid marriage.

Over the law of divorce the Ecclesiastical Courts had complete control till 1857. This jurisdiction comprised suits for the restitution of conjugal rights, suits for nullity, either when the marriage is ab initio void, or when it is voidable, suits for a divorce a mensa et thoro by reason of adultery or cruelty. The Ecclesiastical Courts could pronounce a marriage void ab initio; and in that case the parties were said to be divorced a vinculo matrimonii. But they had no power to pronounce a divorce a vinculo if there had been a valid marriage.[3]

For a short time after the Reformation the Ecclesiastical Courts seemed to have considered that they had this power.[4] But this opinion was overruled in 1602.[5] A valid marriage was therefore indissoluble, except with the aid of the legislature. At the end of the 17th century a practice sprang up of procuring divorces by private act of Parliament.[6] The bills were introduced into the House of Lords, who strictly examined the circumstances of the case. As conditions precedent it was necessary to have obtained a decree a mensa et thoro from the Ecclesiastical Court, and to have recovered damages against the adulterer in an action at common law for criminal conversation.

The anomaly of this state of the law was striking. It practically made divorce the privilege of the very rich. This was forcibly expressed by Maule, J., in his address to a

[1] P. and M. ii 372-383.

[2] The Queen v. Millis, 10 Cl. and Fin. 534; Beamish v. Beamish, 9 H.L.C. 274; P. and M. ii 369, 370-372.

[3] Ecclesiastical Commission 1832, 43.

[4] Encyclopædia Britannica (10th Ed.) Tit. Divorce. In Lord Northampton's case (Ed. VI.) the delegates pronounced in favour of a second marriage after a decree of divorce a mensa et thoro. In the Reformatio Legum the power to grant a complete divorce was recommended.

[5] Foljambe's case; Porter's case, 3 Cro. 461.

[6] 1669 Lord de Ross; 1692 Duke of Norfolk. Before 1715 only 5 such bills were known, between 1715 and 1775 there were 60, between 1775 and 1800 there were 74, between 1800 and 1850 there were 90.

prisoner who had been convicted of bigamy, after his wife had committed adultery, and deserted him. "Prisoner at the bar," he said, "you have been convicted of the offence of bigamy, that is to say, of marrying a woman while you have a wife still alive, though it is true she has deserted you, and is still living in adultery with another man. You have, therefore, committed a crime against the laws of your country, and you have also acted under a very serious misapprehension of the course which you ought to have pursued. You should have gone to the Ecclesiastical Court and there obtained against your wife a decree a mensa et thoro. You should then have brought an action in the Courts of Common Law and recovered, as no doubt you would have recovered, damages against your wife's paramour. Armed with these decrees you should have approached the legislature, and obtained an act of Parliament, which would have rendered you free, and legally competent to marry the person whom you have taken on yourself to marry with no such sanction. It is quite true that these proceedings would have cost you many hundreds of pounds, whereas you probably have not as many pence. But the law knows no distinction between rich and poor. The sentence of the court upon you therefore is that you be imprisoned for one day, which period has already been exceeded, as you have been in custody since the commencement of the assizes."

In 1857 all jurisdiction over divorce and over "all causes and suits and matters matrimonial" were taken from the Ecclesiastical Courts and vested in a court called the Divorce court.[1] The Lord Chancellor, the chief justices, and the senior puisne judges of the Courts of Common Law, and the judge of the court of Probate were made the judges of the court. The judge of the court of Probate was made the judge ordinary of the court.[2] In some cases he could sit alone, in others he must sit with one of the other judges of the court. When he sat alone there was an appeal to the full court.[3] An appeal to the House of Lords from decrees of dissolution or nullity of marriage was provided in 1868.[4]

In this court was vested the jurisdiction and powers of the Ecclesiastical Courts, the powers of the legislature to grant an absolute divorce, the powers of the Common Law Courts to award damages in an action for criminal conversation.[5] The latter action was abolished.[6] In addition a wife deserted by

[1] 20, 21 Vict. c. 85. [2] §§ 8 and 9. [3] § 55. [4] 31, 32 Vict. c. 77.
[5] 20, 21 Vict. c. 85 §§ 6, 7, 27, 31, 33. [6] § 59.

her husband was enabled to apply to the magistrate for a protection order.[1]

The act has been in the opinion of the person most qualified to judge a complete success. Sir Francis Jeune writes,[2] "Probably few measures have been conceived with such consummate skill and knowledge, and few conducted through Parliament with such dexterity and determination. The leading opponent of the measure was Mr Gladstone, backed by the zeal of the High Church party, and inspired by his own matchless subtlety and resource. But the contest proved to be unequal. After many debates, in which every line, almost every word, of the measure was hotly contested . . . it emerged substantially as it had been introduced. Not the least part of the merit and success of the act of 1857 is due to the skill which, while effecting a great social change, did so with the smallest possible amount of innovation."

(*b*) Testamentary.

The ecclesiastical courts obtained jurisdiction over grants of Probate and Administration, and, to a certain degree, over the conduct of the executor and administrator. All these branches of their jurisdiction could be exercised only over personal estate; and this abandonment of jurisdiction to the Ecclesiastical Courts has tended, more than any other single cause, to accentuate the difference between real and personal property. Even when the Ecclesiastical Courts had ceased to exercise some parts of this jurisdiction, the law which they had created was exercised by their successors.

We shall consider (1) the origin and extent of the jurisdiction of the Ecclesiastical Courts, and (2) the decay of this jurisdiction.

(1) *The origin and extent of the jurisdiction of the Ecclesiastical Courts.*

(*a*) Jurisdiction over grants of Probate.

The origin of this jurisdiction is difficult to discover. Neither the civil nor the canon law sanctioned it.[3] We hear nothing of it in England in the 12th century; and Selden says "I could never see an express probate in any particular case older than about Henry III."[4] Testators rather sought the protection of the king or of some powerful individual; and the effect might be somewhat similar to that of a grant of probate in later law.[5]

[1] § 21. [2] Encyclopædia Britannica loc. cit.

[3] Selden, Original of the Ecclesiastical Jurisdiction of Testaments, chap. i.

[4] Ibid, chap. vi. Cp. P. and M. ii 339.

[5] Selden, ibid, chap. v, cites a case in Saxon times in which a testator made three copies of his will. One he kept; another he handed to the abbot of Ely,

But as early as the reign of Henry II. it is probable that jurisdiction in cases of disputed wills belonged to the Ecclesiastical Courts. Glanvil says definitely that this was the law in his day;[1] and amid all the disputes of Henry II.'s reign, as to the limits of the jurisdiction of the Ecclesiastical Courts, no claim to exercise this species of jurisdiction was put forward by the king's courts.[2] Once admit that the Ecclesiastical Courts have jurisdiction to decide cases of disputed wills, and a jurisdiction to grant probate will follow. At the same time old ideas die hard. Some lords of manors successfully asserted the right to have all the wills of their tenants proved in their courts. Possibly in some cases this is a survival from the days when, probate in the technical sense being unknown, the protection of a lord was sought for a will;[3] though in other cases it may, as Professor Maitland suggests, have originated in later grants from the Pope.[4]

In a constitution of Archbishop Stratford of 1380, the jurisdiction is said to belong to the Church, "consensu regis et magnatum regis."[5] Lyndwood says "de consuetudine tamen hæc approbatio in Anglia pertinent ad judices ecclesiasticos."[6] Selden, too, considers that it rests upon immemorial custom; though he conjectures that it may have been handed over to the Church by a Parliament of John's reign.[7] We shall see that this is more probably true of the jurisdiction over grants of administration to one who has died intestate. But the fact that about this time the Ecclesiastical Courts got jurisdiction over grants of administration, over legacies, and, in some cases, over debts due by or to a deceased testator, may have been decisive in favour of this closely allied branch of the same jurisdiction.

(*b*) Jurisdiction over distribution of intestates' goods and grants of Administration.

the chief beneficiary; the third he gave to the alderman "et petiit ab illo ut suum testamentum stare concederet." Ibid, chap. vii, there is a case of King John assenting to or licencing the will of a certain Oliver de Rocheford.

[1] vii 8, Placitum de testamentis coram judice ecclesiastico fieri debet.

[2] Selden, Original, etc., chap. v.

[3] Britton i 75 does not mention this among the royal franchises.

[4] P. and M. ii 340. Alexander II. granted to the Cistercians in England the right to grant probate of the wills of their tenants and farmers. In other cases this jurisdiction may be the result of mere usurpation. In 1342 Archp. Stratford complained of this; and this was not a single instance, Lyndwood 260, 263.

[5] Hensloe's case (1600) 9 Co. Rep. 36; Lyndwood 176 sub voc. ecclesiasticarum libertatum.

[6] 174 sub voc. approbatis.

[7] Original, etc., chap. vi. Cp. P. and M. ii 339 n. 4.

Probably jurisdiction over the distribution of intestates' goods belonged originally to the temporal courts.[1]

In Saxon times the kindred who inherit would seem to have been the persons who superintended the distribution of intestates' goods.[2] This is the arrangement which we find in Glanvil; and neither Walter de Map nor John of Salisbury mention this branch of the jurisdiction of the Ecclesiastical Courts, though they have much to say respecting them.[3]

A canon made at a council held at St Paul's before Othobon[4] (1268) speaks of "a provision made as to the goods of intestates which is said to have emanated from the prelates of the realm with the consent of the king and barons." In the opinion of Selden[5] and of Professor Maitland[6] this refers to § 27 of Magna Carta, which provides that the goods of an intestate shall be distributed by the hands of his near relations and friends "per visum ecclesiæ salvis unicuique debitis."[7] This was the rule known to Bracton. "Ad ecclesiam et ad amicos pertinet executio bonorum."[8] A claim to superintend the distribution made by the kinsfolk will without much difficulty become a claim to administer. And the claim was here peculiarly strong. The man who dies intestate will probably have died unconfessed.[9] There could be no sure and certain hope as to the state of such a person. The Church should obviously see that the property, of which he might have disposed by will, is distributed for the good of his soul. Distribution by the kinsfolk "pro anima ejus" of Henry I.'s Charter; distribution "per visum ecclesiæ" of Magna Carta; actual administration by the Ordinary, perhaps mark the stages by which the Ecclesiastical Courts acquired jurisdiction. Up till Edward III.'s reign the court actually administered and made the distribution among those relatives of the deceased who were entitled. But its conduct was so negligent and even fraudulent that the legislature interfered.[10] The court was obliged to delegate its powers to administrators, whom it was obliged to appoint from among

[1] Selden, Disposition of Intestates' Goods, chap. i; Dyke v. Walford (1846) 5 Moo. P.C. 434, 487. [2] Charter of Henry I. § 7 (Sel. Ch. 101).
[3] Selden, Disposition, etc., chap. ii.
[4] John of Athona 122. [5] Disposition, etc., chap. iii.
[6] P. and M. ii 358 n. 2. [7] M.C. 1215. [8] f. 60 b.
[9] Bracton f. 60 b.; P. and M. ii 355, 356.
[10] A constitution of archbp. Stratford in 1342 recites that the clergy as executors and administrators have converted goods to their own use, "in ecclesiarum fraudem seu damnum suorum creditorum liberorum et suarum uxorum qui et quæ quam de jure tam de consuetudine certum quotam dictorum bonorum habere deberet." Cp. 13 Ed. I. c. 19; Bl. Comm. ii 495.

the relatives of the deceased.[1] Instead of distributing the estate the Ecclesiastical Court merely grants administration. These administrators were by the statute assimilated in all respects to executors. Like executors they are the personal representatives of the deceased.

(*c*) Jurisdiction over the conduct of the executor and administrator.

In the 13th century the Ecclesiastical Courts obtained jurisdiction over legacies, and in certain cases over debts due to or by a testator.

According to the civil law the bishop had a concurrent jurisdiction with the lay courts over legacies left in pios usus.[2] There is a vague provision made by some council of Mentz which seems to give the bishop an indefinite right of interference.[3] But in other countries this does not appear to have given to the Ecclesiastical Courts any jurisdiction beyond that over legacies left in pios usus. In Glanvil's time legacies could be recovered in the king's court.[4] Selden gives specimens of writs of the time of Henry III. ordering executors to fulfil the wills of their testators.[5] But it is possible that the royal courts assumed jurisdiction in some of these cases for special reasons. It is probable that, even in Henry II.'s reign, the Ecclesiastical Courts had a jurisdiction concurrent with that of the temporal courts. No writ of prohibition issued if a suit for legacies was begun in the Ecclesiastical Court. Selden said that he had seen none on the plea rolls of either Richard I., John, or Henry III.[6] Both Bracton and Fleta state definitely that no prohibition lies in such a case.[7] In 1230 it was decided that a legatee could not recover in the king's court, but must sue in the Ecclesiastical Court.[8]

When the Ordinary was obliged by law to delegate its power over the goods of an intestate to an administrator, the Ecclesiastical Court naturally assumed jurisdiction over the due distribution of the estate by the administrator.

[1] 31 Ed. III. St. 1 c. 11; 21 Henry VIII. c. 5. It is after the statute of Ed. III. that we get the term administrator technically used. Before, the term had been executor dative and executor testamentary, P. and M. ii 359 n. 1.

[2] Selden, Original, etc., chaps. iii and iv.

[3] Cited ibid, chap. iv, "Si heredes jussa testatoris non impleverint, ab episcopo loci illius omnis res quæ eis relicta est canonice interdicatur cum fructibus et cæteris emolumentis ut vota defuncti impleantur." [4] vii 6, 7; xii 17.

[5] Original, etc., chap. vii. [6] Original, etc., chap. viii.

[7] Bracton f. 407, "Item non locum habet prohibitio in causa testamentaria si catella legentur et inde agatur in foro ecclesiastico;" Fleta II. 57. 13.

[8] Bracton's Note Book no. 381.

The Ecclesiastical Courts never possessed more than a limited jurisdiction over debts due to or by a testator; and that jurisdiction was effectively exercised only for a short time.[1]

When Glanvil wrote, the heir is the person liable to carry out the will and to pay the debts.[2] In Bracton's time the heir must pay the debts to the extent of the chattels which he has received from the deceased, and he can sue the deceased's creditors.[3] In the time both of Glanvil and Bracton the heir sues and is sued in the king's court. In the time of Bracton, however, the executor can sue on debts acknowledged in the testator's lifetime, because such debts are substantially the testator's goods. He can be sued if he has been directed in the will to pay the debts, because such direction amounts to something very like a legacy.[4] Britton and Fleta limit the liability of the heir to cases where he has been specially bound to pay by the deed of his ancestor, or where the debt is owed to the king.[5] It is clear that the heir is ceasing to be the person primarily liable to pay the debts of the deceased.

When the executor sues, or is sued, the proceedings take place in the Ecclesiastical Courts. The Ecclesiastical Courts naturally attempted to extend their jurisdiction to cover all actions by or against executors.[6] But, in the late 13th and in the 14th and 15th centuries, the king's court refused to allow this extension. They gave rights of action to or against executors (and later), to or against administrators.[7] The Ecclesiastical Courts thus lost jurisdiction over actions of this kind.

Indirectly, however, the position which the executor or administrator came to occupy in the king's court assisted the jurisdiction of the Ecclesiastical Courts. He gradually takes the place which the heir had occupied in the 12th century.[8] He becomes primarily, and, at length, with one exception,[9] solely liable to the creditors of the deceased. He becomes in fact the deceased's personal representative.

This new position taken by the executor or the ad-

[1] On this subject see Goffin, The Testamentary Executor 37-63.
[2] vii 8; Holmes, Common Law, 346-348.
[3] ff. 61, 407 b. [4] f. 407 b; Goffin 40-44.
[5] Britton i 163; Fleta II. 62. 10 "Et notandum quod hæres non tenetur in Anglia ad debita Antecessoris reddenda, nisi per Antecessorem ad hoc fuerit obligatus, præterquam debita Regis tantum, et super hoc fit Statutum tale in magna carta"—i.e. § 26 (1215)
[6] Goffin 45-47. [7] P. and M. ii 345. [8] Goffin 47-63.
[9] Specialty debts where the heir is named.

ministrator tended to develop the jurisdiction of the Ecclesiastical Courts over the administration of the estate. The executor or administrator was amenable to them; and he was now the personal representative. Thus we find that the Ecclesiastical Courts laid down rules intended to secure the creditors, the legatees, or those entitled on intestacy. The executor or administrator was compelled to make an inventory.[1] He must account at the close of the administration;[2] and in some cases he must give a bond to secure the production of the account.[3] He was given remedies against those who detained the property of the deceased.[4] Penalties were denounced against him if he appropriated the deceased's property.[5] Like the tutor suspectus of Roman law he could be removed by the court if good ground of suspicion were shown.[6]

This jurisdiction of the Ecclesiastical Courts was clearly the consequence of the jurisdiction over probate, legacies, and the administration of intestates' effects which they had been allowed to assume in the 13th century. That they should have gained this jurisdiction about this time is not perhaps strange. As Selden points out,[7] the clergy played a part—perhaps the most important part—in the events which led to the passing of Magna Carta. There were English precedents for the jurisdiction of the Ecclesiastical Courts—though not for their exclusive jurisdiction. The only serious rival to the Ecclesiastical Courts was the king's court. The judges of that court were generally clerics. They acted, it is true, loyally as temporal judges.[8] But they cannot have been altogether opposed to "arranging a concordat" with the Ecclesiastical Courts, which eventually gave to the Ecclesiastical Courts in England a jurisdiction over matters testamentary, larger than that possessed by any other Ecclesiastical Courts in Europe. For, as Lyndwood says, this jurisdiction "de consuetudine Angliæ pertinet ad judices ecclesiasticos . . . secus tamen est de jure communi."[9]

[1] Lyndwood 176 sub voc. inventarium. Cp. 21 Henry VIII. c. 5 § 4.

[2] Ibid 180 (sub voc. sibi). "Inferiores, viz., Ordinarii coram Episcopo, Episcopus coram Archiepiscopo . . . Archiepiscopus autem de administratis per eum coram suis confratribus in Concilio Provinciali reddet rationem; non tamen ab eis, si quid suspiciose fecerit, redarguendus est, sed suo Superiori, viz., Papæ super hoc denunciandus."

[3] 170 (sub. voc. sufficienter cavere); 176. [4] Lyndwood 171, 179.

[5] Constitution of Archbp. Stratford, Lyndwood, at pp. 180, 181.

[6] Lyndwood 177 sub. voc. nisi talibus; P. and M. ii 341.

[7] Disposition, etc., chap. iv. [8] P. and M. i 111-113, 139.

[9] P. 170 sub. voc. insinuationem.

(2) *The decay of the jurisdiction of the Ecclesiastical Courts.*

We have seen that, in the 14th century, the executor and the administrator had been granted rights of action, and had been rendered liable to be sued in the king's court for the debts due to and by the deceased. But the remedies given by the king's courts were by no means complete, till, at the end of the 16th and beginning of the 17th century, it was definitely decided, that executors and administrators could sue and be sued by the action of assumpsit.[1] The extension of what was in its origin a quasi delictual action to the representative was no doubt caused by the fact that he would otherwise have had recourse to the court of Equity.[2] This move on the part of the Common Law Courts made a recourse to the court of Equity unnecessary in this particular class of case. But, it was the extension of the equitable jurisdiction in other directions, which finally deprived the Ecclesiastical Courts of all effective jurisdiction, except that over probate and grants of administration. This extension was necessitated by the jealousy felt by the Common Law Courts for any rival jurisdiction. The jurisdiction of the Ecclesiastical Courts was crippled; and, as the court of Equity had succeeded in defeating the attempts made by the Common Law Courts to treat it,[3] as they had treated the court of Admiralty,[4] and the Ecclesiastical Courts, it was able to offer more complete and better remedies.

The Common Law Courts had made it almost impossible for the Ecclesiastical Courts to act at all. They would not allow the truth of the inventory to be enquired into.[5] They would not allow the creditors to examine into the truth of the executor's accounts because he had a remedy at common law.[6] They issued writs of prohibition against all who sued upon the bonds taken to secure the production of a proper account.[7] We are not surprised, therefore, to find that applications were made at the end of the 15th century to the Chancellor in cases which involved the taking of accounts.[8] The Chancellor could also assist the plaintiff by enforcing discovery against the executor.[9] The extension of the

[1] Cleymond v. Vincent, Y.B. 12 Hy. VIII. Mich. pl. 3; Norwood v. Read (1557) Plowden 180; Pinchon's case (1612) 9 Co. Rep. 86 b.
[2] Vavasour and Kyghley v. Chadworth, Cal. i xciii; Select Cases in Chancery (S.S.) nos. 104, 109, 143; Y.B. 4 Henry VII., Hill, pl. 8.
[3] Above 250. [4] Above 325, 326. [5] Spence, Equity, i 579.
[6] Ibid. [7] Hughes v. Hughes (1666) Carter's Rep. 125.
[8] Select Cases in Chancery (S.S.) no. 140 (1454).
[9] Spence i 580; Polgrenn v. Feara, Cal. i xxxix.

doctrine of trusts enabled the court to control the personal representative in the interest of all who claimed under a will or an intestacy, whether they were creditors or legatees.[1] It was therefore in the court of Chancery, and not in the Ecclesiastical Courts, that the rules relating to the powers, rights and duties of the personal representative have grown up. The court followed the rules of the Ecclesiastical Courts and of the Common Law Courts respectively when they were applicable.[2] But it was the procedure of the court of Chancery which made it possible to distinctly conceive the complicated equities which arise in the administration of an estate. It was the rules evolved by the court which provided for their adjustment.

The statute of Distributions, it is true, attempted to strengthen the jurisdiction of the Ecclesiastical Courts with a view to secure the proper distribution of the effects of an intestate. It enabled the Ecclesiastical Courts to call administrators to account, and gave the judge power to take bonds for this purpose.[3] But the superior procedure of the court of Chancery prevailed.[4] The Ecclesiastical Courts in practice retained jurisdiction only over grants of probate and administration. When, in 1857, their jurisdiction in matters testamentary was taken away, it was provided that the Court of Probate then established should have no jurisdiction over legacies, or over suits for the distribution of residues.[5]

The Act of 1857 established a court of Probate, presided over by a single judge, to whom was given the rank and precedence of the puisne judges of the superior courts.[6] It was provided that he should be the same person as the judge of the court of Admiralty.[7] He was given the jurisdiction to make grants of probate and administration formerly exercised by the Ecclesiastical Courts.[8] An appeal from his decision lay to the House of Lords.[9]

(3) Jurisdiction over matters of exclusively ecclesiastical cognisance.

[1] Cary 28, 29; Tothill 86; (1738) 1 Atk. 491, injunction issued to stay a suit in the ecclesiastical court; Goffin 74.

[2] Atkins v. Hill (1775) Cowper 284, 287.

[3] 22, 23 Car. II. c. 10 §§ 1, 2, 3.

[4] In Matthews v. Newby (1682) 1 Vern. 133 Lord Hardwicke said that the ecclesiastical court had "but a lame jurisdiction." Its jurisdiction was sometimes simply disregarded. In Bissell v. Axtell (1688) 2 Vern. 47, the Chancellor ordered a fresh account to be taken of the intestate's personal estate, though one had already been taken by the ecclesiastical court.

[5] 20, 21 Vict. c. 77 § 23.

[6] 20, 21 Vict. c. 77 §§ 4, 5, 8.

[7] § 10.

[8] § 4.

[9] § 39.

The Ecclesiastical Courts still have jurisdiction over many matters of exclusively ecclesiastical cognisance, such as questions of doctrine and ritual, ordination, consecration, celebration of divine service, disputed application for faculties.[1] They formerly had jurisdiction over many questions concerning ecclesiastical property such as tithes, church dues, dilapidations. But recent statutes have much curtailed their jurisdiction over these matters.[2] Over one species of ecclesiastical property the temporal courts have always kept a firm hand. From Henry II.'s day the advowson has been regarded as real property, and subject to the jurisdiction of the temporal courts.[3] It would appear from the Constitutions of Clarendon that Henry was at that time prepared to allow the Ecclesiastical Courts jurisdiction over property held in frankalmoigne.[4] But in the 13th century this jurisdiction was denied to them. All questions relating to land, other than consecrated soil, became the subjects of temporal jurisdiction, and subject to rules of temporal law.[5] The barons at the council of Merton refused to change these rules as to legitimacy in order to bring them into harmony with the law of the church. Up to the 17th century a man might, if his parents had subsequently married, be legitimate for some purposes, without being capable of inheriting English land.[6]

The process by which the Ecclesiastical Courts enforced obedience to their decrees was excommunication. It was to the spiritual courts what outlawry was to the temporal courts. If the excommunicate did not submit within 40 days, the Ecclesiastical Court signified this to the crown, and thereon a writ de excommunicato capiendo[7] issued to the sheriff. He took the offender and kept him in prison till he submitted. When he submitted the bishop signified this, and a writ de excommunicato deliberando issued.

The temporal consequences of excommunication were serious. The excommunicate cannot do any act which is required to be done by a probus et legalis homo. "He cannot serve upon juries, cannot be a witness in any court, and, which is worst of all, cannot bring an action either real or personal, to recover lands or money due to him."[8] An

[1] Ecclesiastical Commission 1883, li.

[2] 6, 7 Will IV. c. 71 (tithes); 31, 32 Vict. c. 109 (church-rates); 34, 35 Vict. c. 43 (dilapidations).

[3] Constitutions of Clarendon c. 1.

[4] c. 9. The assize utrum (App. II.) was provided to try the question whether or no the property was held by this tenure.

[5] P. and M. i 224-230.

[6] Maitland, Canon Law, 53-56.

[7] App XVIII.

[8] Bl. Comm. iii 102.

act of Elizabeth's reign improved the procedure on the writ de excommunicato capiendo.[1] In 1813 it ceased to exist as part of the process of the Ecclesiastical Court to enforce appearance, and as a punishment for contempt. For it was substituted the writ de contumace capiendo.[2] The rules applying to the older writ were made applicable to the new. Excommunication is still a punishment for offences of ecclesiastical cognisance; and, on a definitive sentence for such an offence, the writ de excommunicato capiendo can still issue; but it is provided that a person pronounced excommunicate shall not incur any civil penalty or incapacity, except such imprisonment (not exceeding six months) as the court pronouncing the excommunication may direct.[3]

[1] 5 Eliz. c. 23. [2] 53 Geo. III. c. 127 § 1. [3] § 3.

## CHAPTER VIII

## THE JUDICATURE ACTS

BAGEHOT[1] writing of the period of the Reform Bill of 1832 said, "I am afraid the moral of those times is that these English qualities as a whole—merits and defects together—are better suited to an early age of politics than to a later. As long as materials are deficient, these qualities are most successful in hitting off simple expedients, in adapting old things to new uses, and in extending ancient customs; they are fit for instantaneous little creations, and admirable at bit by bit growth. But when, by the incessant application of centuries, these qualities have created an accumulated mass of complex institutions, they are apt to fail unless aided by others very different. The instantaneous origination of obvious expedients is of no use when the field is already covered with the heterogeneous growth of complex past expedients; bit by bit development is out of place unless you are sure which bit should, which bit should not, be developed; the extension of customs may easily mislead when there are so many customs; no immense and involved subject can be set right except by faculties which can grasp what is immense and scrutinize what is involved."

These words might have been written of the judicial system of the country as it existed at the beginning of the 19th century. It was the result of "bit by bit growth." It was compounded in all its parts of a "heterogeneous growth of complex past expedients."

The housing and the position of the courts would have afforded a very fair index to the law which they administered, and the procedure which they employed. The English judicial system was perhaps the most completely centralized of any existing system. Yet, as late as 1860, the courts and the offices attached to the courts were scattered all over London.[2] The Rolls court was in Chancery Lane, and the other courts

[1] Biographical Studies 284.

[2] Report as to bringing the courts together into one place, Parliamentary Papers 1860, vol. xxxi 89.

of Equity were in Lincoln's Inn. The offices and chambers attached to these courts were scattered about among the adjoining lanes and inns. The Courts of Common Law sat at Westminster Hall; but the judges' chambers were in the Rolls gardens. The Masters' offices of the Kings' Bench were in the Temple; those of the Common Pleas were in Serjeants' Inn and Chancery Lane; those of the Exchequer were in Stone Buildings, Lincoln's Inn. The Judge of the Probate and Divorce court, having no court of his own, borrowed the Lord Chancellor's court in Westminster Hall. But his registrar's office and the depository of wills were at Doctors' Commons. The judge of the court of Admiralty was in the same destitute condition. He borrowed sometimes the Hall of the College of Advocates, sometimes the court of the Master of the Rolls at Westminster. The offices attached to his court were also at Doctors' Commons. The Lord Chancellor and the Lords Justices in Chancery sat in Lincoln's Inn Hall. In fact the head of the legal profession was really a tenant at will of the Benchers of Lincoln's Inn.

The offices attached to the courts were nests of abuses and anomalies. We have seen that the courts, both of common law and of equity, were staffed by a body of officials which had been gradually and silently evolved either by real necessity or by the desire to create patronage.[1] Payment by fees, saleable offices, and sinecure places were the predominant characteristics of a bureaucracy which could not be defended even upon historical grounds.

The procedure of the courts bore upon it the traces of all the varied epochs through which the law had passed in the course of its long history. Real actions, assizes, appeals of murder, deodands, trial by battle, compurgation, though practically dead, were still legally possible. The devices of a later period in the history of the law had peopled the courts with legal fictions. The most famous of them—the casual ejector and John Doe and Richard Roe—still led an active and busy life. At common law the system of pleading too often effectually obscured the real merits of the case. "At a moment," said Bowen, L.J.,[2] "when the pecuniary enterprises of the kingdom were covering the world, when railways at home and steam upon the seas were creating everywhere new centres of industrial and commercial life,

[1] Above 110-112; 231-235; App. XXIV. and XXV.

[2] Paper on the Administration of the law in the reign of Queen Victoria in "the Reign of Queen Victoria," edited by T. H. Ward, i 285. Cp. A Century of Law Reform 209-221.

the Common Law Courts of the realm seemed constantly occupied in the discussion of the merest legal conundrums which bore no relation to the merits of any controversies except those of pedants, and in the direction of a machinery that belonged already to the past." The procedure in the courts of equity suffered from different but no less fatal defects. Even Lord Eldon's commission could not deny the defects, though it attempted to assign them rather to the law than to the procedure of the court.[1] "A Bill in Chancery," said Bowen, L.J.,[2] "was a marvellous document which stated the plaintiff's case at full length and three times over. There was the first part in which the story was circumstantially set forth. Then came the part which 'charged' its truth against the defendant—or, in other words, which set it forth all over again in an aggrieved tone. Lastly came the interrogating part, which converted the original allegations into a chain of subtly framed enquiries addressed to the defendant, minutely dove-tailed, and circuitously arranged, so as to surround a slippery conscience and to stop up every earth.[3] No layman, however intelligent, could compose the 'answer' without professional aid. It was inevitably so elaborate and so long that the responsibility for the accuracy of the story shifted during its telling from the conscience of the defendant to that of his solicitor and counsel, and truth found no difficulty in disappearing during the operation." The system of equitable procedure might be well devised to secure complete justice in a world where considerations of time and cost could be disregarded—but in no other place. It is admitted that Dickens's pictures of Jarndyce v. Jarndyce and Bardell v. Pickwick, of Doctors' Commons and the Ecclesiastical Courts, of the beadle, the local justice, and the constable contain much real history.

Perhaps the worst anomaly of all was caused by the clashing jurisdiction of the various courts which administered the law. Courts of Common Law and Equity, the court of Admiralty, and the Ecclesiastical courts administered separate bodies of law, with a separate procedure, and a separate

[1] At p. 34 of the Report of 1826 it was said that "many suits owe their origin to, and many others are greatly protracted by questions arising from the niceties and subtleties of the law and practice of conveyancing."

[2] Administration of the Law, etc., 290, 291. Cp. A Century of Law Reform 177-202, 221-227.

[3] If the questions were evaded the Bill might be amended till a plain answer was got. This process was known as "scraping the defendants' conscience," A Century of Law Reform 186.

vocabulary of technical terms.[1] The limits of their jurisdiction were uncertain; and the suitor might pursue his way through the courts, to find, perhaps in the House of Lords, that he had from the first mistaken his court.[2] The most striking illustration of this anomaly was the almost complete separation existing between the Courts of Common Law and Equity. It is the most striking illustration because the two sets of courts administered systems of law, which were not merely rival, but even directly contradictory. Palgrave,[3] writing in 1834, said that, "it must appear a singular anomaly to a foreigner, when he is informed that our English tribunals are marshalled into opposite, and even, hostile ranks: guided by maxims so discrepant, that the title which enables the suitor to obtain a decree without the slightest doubt or hesitation if he files a bill in equity, ensures a judgment against him should he appear as plaintiff in a declaration at common law. And exercising their respective jurisdictions by means of forms and pleadings, which have as little similarity as if they existed among nations whose laws and customs were wholly strange to each other." A cause set down for trial at common law might be stopped for two or three years by the issue of an injunction. It might well happen, that if the injunction were dissolved at the end of the period, the plaintiff's most important witnesses were dead or out of the kingdom. An action nearly completed might be stopped by the issue of an injunction, obtained for an insufficient answer to an intricate and voluminous bill, filed for the sole purpose of delay, and without merits either in law or equity.[4]

The early years of the 19th century saw the gradual

[1] The Judicature Commission of 1868 (Parliamentary Papers 1868, vol. xxv), reported at p. 10, that "the present modes of procedure in the Court of Chancery, the Courts of Common Law, the Court of Admiralty, and the Courts of Probate and Divorce are in many respects different; the forms of pleading are different, the modes of trial and of taking evidence are different, the nomenclature is different, the same instrument being called by a different name in different courts; almost every step in the cause is different . . . nor is the difference due entirely to the different nature of the cases which the courts are called upon to try; for often the same question has to be tried, and the same remedy sought, by a totally different method, according as the proceeding is in the Court of Chancery, the Courts of Common Law, or the Court of Admiralty."

[2] In Knight v. Marquis of Waterford (1844) 11 Cl. and Fin. 653, 14 years of litigation merely resulted in the discovery by the House of Lords that the plaintiff had mistaken his remedy. See a similar case cited in A Century of Law Reform 208; and Preface to 11 Hare's Reports xiv.

[3] The Council 1; cp. Warren, Law Studies, i 485, 486.

[4] Third Report of Commission appointed to enquire into the Courts of Common Law, Parliamentary Papers 1831, vol. x p. 20.

abolition of many of these abuses. From 1829 to 1834 we get six reports from commissioners for enquiring into the procedure and practice of the Courts of Common Law. In 1832 a report was presented upon the Ecclesiastical Courts. From 1829 to 1833 there are four reports of the Real Property commissioners. From 1834 to 1845 there are eight reports on criminal law. In 1840 a report was presented on the law of Bankruptcy. These reports were the precursors of statutes which have changed the face of English law.

We have seen that the official staff, both of the Courts of Common Law and of the Courts of Equity has been made at once more efficient and less expensive. In the same way the system of procedure has been reformed by the abolition of obsolete forms of action and modes of trial, and by the extensive powers given to the judges of amending faulty pleadings. The reports of the commissions, upon which the Common Law Procedure Acts were founded, dealt also with the evils arising from the separation and antagonism of the Courts of Common Law and Equity.

The commission of 1857 reported[1] that the powers and machinery of the Courts of Common Law were insufficient to deal fully with matters falling within the scope of their own jurisdiction. Parties were obliged to resort to a court of Equity to compel the discovery of facts within the knowledge of the other party, or of documents, when they were ignorant in whose custody they were. Following the recommendations of the common law commissioners of 1831, they gave it as their opinion that, "every court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction." To attain this object, it was proposed to give to the courts of law a power to grant the specific performance of contracts, by an extension of the writ of mandamus, and to give them the power to restrain threatened breaches of contract by an extension of the writ of prohibition. It was proposed that the right to a peremptory injunction should operate as a legal defence, and, generally, that the Courts of Common Law should have the right to repel inequitable defences. On the other hand, it was proposed to give to the court of Chancery certain powers belonging to the Courts of Common Law, and, in particular,

[1] Second Report of the Commissioners for enquiring into the practice and procedure of the Superior Courts of Common Law, Parliamentary Papers 1852-3, vol. xl pp. 34, 35, 38, 39.

to require it to decide all legal questions arising in the course of a case, without sending them to a Court of Common Law for decision.[1]

Certain of these recommendations were carried out by the Common Law Procedure Act of 1854.[2] The effect of that act is well summarized in the report of the Judicature Commission. "The Court of Chancery," said the commissioners, "is now not only empowered, but bound to decide for itself all questions of common law without having recourse as formerly to the aid of a Common Law Court. . . . The Court is further empowered to take evidence orally in open Court, and in certain cases to award damages for breaches of contract, or wrongs, as at common law; and trial by jury—the great distinguishing feature of the common law—has recently for the first time been introduced into the Court of Chancery. On the other hand, the Courts of Common Law are now authorized to compel discovery in all cases in which a court of Equity would have enforced it in a suit instituted for that purpose. A limited power has been conferred on Courts of Common Law to grant injunctions, and to allow equitable defences to be pleaded, and in certain cases to grant relief from forfeitures."[3]

The extent, however, to which the Common Law Procedure Acts had fused law and equity was slight. Practically the Acts only applied where a Court of Equity would have granted an absolute and perpetual injunction. In such a case the Court of Common Law could give effect to the equitable defence without departing from the usual form of a common law judgment—"that the plaintiff take nothing by his writ, and that the defendant go thereof without day." But the Common Law Courts could not give any effect to equitable defences in cases in which a Court of Equity would have granted only a temporary or conditional injunction. "We cannot," said Lord Campbell, "enter into equities and cross equities; we should often be without means to determine what are the fit conditions on which relief should be given; no power is conferred upon us to pronounce a conditional judgment; no process is provided by which we could enforce performance of the condition. There are no writs of execution against person or goods adapted to such a judg-

[1] Second Report, etc., 40-42; cp. Third Report of the Common Law Commissioners of 1831, Parliamentary Papers x 74, 75.

[2] 17 18 Vict. c. 125 §§ 68, 79, 83.

[3] First Report of the Judicature Commision, Parliamentary Papers 1868-9, vol. xxv p. 6.

ment."[1] It cannot therefore be said that the Acts in any way accomplished the ideal of the commissioners of 1831 or 1851. The Courts of Common Law and Equity did not possess within themselves the means of administering complete justice within the scope of their jurisdiction. Injunctions were still needed; and, in any case where a Court of Equity had concurrent jurisdiction, it might still use injunctions, as before, to stay proceedings at law.[2] It was said at the time that "the fusion of the several jurisdictions had gone little further than to add to that which was artificial in the Court of Chancery, the not less obscure technicalities which are peculiar to the Courts of law."[3]

The commissioners of 1851 had proposed to go further in the direction of fusion. But the Chancery judges had opposed this proposal, unless it were made part of a larger scheme for remodelling the judicial system as a whole.[4] It was becoming more and more clear that this was the true solution. The passing of the Companies Acts, and the consequent rise of the Limited Company enforced this truth. Directors of Companies are both agents and trustees. Simultaneous proceedings arising upon the same facts might, and were brought against them in the Courts of Common Law and the Courts of Equity. If the scandal of conflicting decisions was to be avoided it was clear that there must be one supreme court administering both law and equity.[5] It was this expedient alone whch could get rid of the separate modes of procedure and pleading which still prevailed at the Courts of Equity and Common Law, in the Courts of Admiralty, Probate, and Divorce.

It was these considerations which induced the Judicature commission to report in 1868 in favour of a complete fusion of jurisdiction and procedure. The result was the passing of the Judicature Acts, and the Appellate Jurisdiction Act, which have completely remodelled the form, the jurisdiction, and the procedure of the courts.

*The Judicature Acts.*

The first Judicature Act was passed in 1873, and came into operation in 1875. By virtue of its provisions (as

[1] Wodehouse v. Farebrother (1855) 5 E. and B. 277; Mines Royal Societies v. Magnay (1854) 10 Exch. Rep. 495; Gorely v. Gorely (1856) 1 H. and N. 144. Cp. Gee v. Smart (1857) 8 E. and B. 313; De Pothonier v. De Mattos (1858) 27 L. J. N. S. Q.B. 260, cases when an equitable plea was admitted.

[2] Brenan v. Preston (1853) 10 Hare 331.

[3] 11 Hare's Peports, Preface xxix. [4] Warren, Law Studies, i 550-557.

[5] First Report of the Judicature Commission 7.

modified by later Acts) the Court of Chancery, the Courts of King's Bench, Common Pleas, and Exchequer, the Court of Admiralty, the Court of Probate, the Divorce Court, and the London Court of Bankruptcy were consolidated, and formed into one Supreme Court of Judicature in England.[1]

The Supreme Court of Judicature was then divided into two parts, (1) the High Court of Justice, (2) the Court of Appeal.[2] Both these branches of the Supreme Court were constituted superior courts of record.[3] The clause of the Act of Settlement relating to the judges' tenure of office was reinacted, and they were incapacitated from sitting in the House of Commons.[4] It was provided that the judges of the High Court and the Court of Appeal respectively should, without prejudice to existing rights, have similar privileges and be subject to similar duties.[5]

(i) The High Court of Justice.

The existing judges of the Court of Chancery, the Courts of Common Law, the Probate and Divorce Court, and the Court of Admiralty were constituted judges of the High Court.[6] But it was provided that the Chancellor of the Exchequer, and the Lord High Treasurer should no longer have the judicial powers which they might formerly have exercised in the Court of Exchequer.[7] For the future any barrister of ten years' standing was qualified to be appointed judge in the Court.[8] The style of the judges is "Justices of the High Court."[9]

To the High Court was assigned the jurisdiction exercised by the following courts:—[10]

(1) The High Court of Chancery as a common law court as well as a court of Equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the court of Chancery as a common law court;

(2) The Court of King's Bench;

(3) The Court of Common Pleas at Westminster;

(4) The Court of Exchequer as a court of Revenue as well as a common law court;

[1] 36, 37 Vict. c. 66 § 3. By 38, 39 Vict. c. 77 § 9 the London Court of Bankruptcy was not to be merged in the Supreme Court. It was again merged by 46, 47 Vict. c. 52 § 93. [2] 36, 37 Vict. c. 66 § 4. [3] §§ 16 and 18.

[4] 36, 37 Vict. c. 66 § 9; 38, 39 Vict. c. 77 § 5.

[5] 36, 37 Vict. c. 66 §§ 5 and 6. [6] §§ 5 and 8. [7] §§ 96 and 97.

[8] To be appointed President of the Probate Divorce and Admiralty Division the barrister must be of 15 years' standing, 54, 55 Vict. c. 53 § 2.

[9] 40 Vict. c. 9 § 4; 44, 45 Vict. c. 68 § 8.

[10] 36, 37 Vict. c. 66 §§ 16 and 17.

(5) The High Court of Admiralty;
(6) The Court of Probate;
(7) The Court for Divorce and Matrimonial Causes;
(8) The London Court of Bankruptcy;
(9) The Court of Common Pleas at Lancaster;
(10) The Court of Pleas at Durham;
(11) The Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions.

It was provided that the court should also hear appeals from Petty and Quarter Sessions, and from the New County Courts.[1] The jurisdiction exercised by the court of Crown Cases Reserved was vested in the judges of the High Court, or any five of them at least, of whom the Lord Chief Justice of England must be one.[2]

In the High Court rules of law and equity were to be administered concurrently.[3] The Act lays down certain rules according to which this legal and equitable jurisdiction is to be administered.[4] It provides generally that, "in all matters, not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity, and the Rules of the Common Law, with reference to the same matter, the Rules of Equity shall prevail."[5]

It was provided that, for the convenience of business (but not so as to prevent any Judge of the Court from sitting wherever required) the High Court should be divided into the following divisions:—[6]

(1) The Chancery Division.

To this division was assigned (1) all causes and matters which by any act of Parliament were assigned to the court of Chancery; (2) the administration of the estates of deceased persons; (3) the dissolution of partnerships or the taking of partnership or other accounts; (4) the redemption or foreclosure of mortgages; (5) the raising of portions or other charges on land; (6) the sale and distribution of the proceeds of property subject to any lien or charge; (7) the execution of trusts charitable or private; (8) the rectification or setting aside, or cancellation of deeds or other written instruments; (9) the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; (10) the petition for sale of real estates; (11) the wardship of infants, and the care of infants' estates.

[1] 36, 37 Vict. c. 66 § 45. [2] § 47; 44, 45 Vict. c. 68 § 15. [3] 36, 37 Vict. c. 66 § 24.
[4] § 25. [5] § 25. 11. [6] § 31; 47, 48 Vict. c. 61 §§ 5 and 6.

(2) The King's Bench Division.
(3) The Common Pleas Division.
(4) The Exchequer Division.

To these divisions was assigned the jurisdiction which would have belonged to these courts before the passing of the Act.[1]

In pursuance of a statutory power[2] given to the crown, these divisions were in 1881 merged in the King's Bench Division. The powers which belonged to the respective presidents of these Divisions were vested in the Lord Chief Justice of the King's Bench, who had, by a previous act, been given the title of the Lord Chief Justice of England.[3]

(5) The Probate Divorce and Admiralty Division.[4]

As a general rule the jurisdiction of the High Court can be exercised by a single judge of the Court.[4] Certain matters, however, must come before a Divisional Court. That is a court which is, as a general rule, composed of two of the judges of the High Court.[5] Instances of cases which must come before a Divisional Court are matters formerly heard by any of the Common Law Courts in banc, appeals from quarter and petty sessions, from the new county courts, and from other inferior courts of record.[6] Some difficulty has arisen in the case of appeals to the High Court from these inferior courts of record. The older method of appeal from these courts was the same as the method of appeal from any of the Common Law Courts, i.e. by writ of error on the record, or on a bill of exceptions. We shall see that the Judicature Acts, and the orders and rules made thereunder, have abolished proceedings in error in the case of appeals to the Court of Appeal.[7] These acts and orders did not touch directly appeals to the King's Bench Division from inferior courts of record. But the Judicature Act of 1884 § 23 gave the power to make rules for regulating appeals from courts inferior to the High Court. Under that act an order has been made which provides for an appeal by

[1] 36, 37 Vict. c. 66 § 34.
[2] 36, 37 Vict. c. 66 § 32. The Order in Council was made Dec. 16th, 1880 and came into force Feb. 26th 1881.
[3] 44, 45 Vict. c. 68 § 25; 36, 37 Vict. c. 66 § 5.
[4] 36, 37 Vict. c. 66 § 39.
[5] § 40; 39, 40 Vict. c. 59 § 17; 47, 48 Vict. c. 61 § 4.
[6] 36, 37 Vict. c. 66 §§ 41 and 45.
[7] Thus the difficulty did not arise in the case of the Mayor's Court in London, because error lay originally to the Exchequer Chamber, and therefore the appeal now lies to the Court of Appeal, Le Blanch v. Reuter's Telegram Co. 1876, L.R. 1 Ex Div. 408.

way of notice of motion. It has been held that this in effect substitutes an appeal by way of notice of motion for the old proceedings in error. But the order changes only the procedure, not the substantive law. "All which was matter of substance in the old form is still a condition precedent to the new appeal. The misdirection must be of a character which could be the subject of a bill of exceptions, and the old authorities on that subject would apply."[1]

To supply the place of the courts held before the Justices of Assize it is provided that the crown by commission of Assize, or by any other commission, general, or special, may assign to any judge of the High Court, or to any of the other persons usually named in such commissions, the duty of trying cases within the places named in the commission.[2] Similarly it is provided that continuous sittings shall be held throughout the year to try cases arising in Middlesex and London, by as many judges as the business to be disposed of may render necessary.[3] Persons acting under these commissions, or judges sitting to try cases arising in Middlesex and London, have all the powers of the High Court. They are to be "deemed to constitute a court of the said High Court of Justice."

(ii) The Court of Appeal.

The following persons are declared to be ex officio members of the Court:—The Lord Chancellor, the Master of the Rolls, the Lord Chief Justice of England, the President of the Probate, Divorce, and Admiralty Division, and any person who has held the office of Lord Chancellor, if, on the request of the Lord Chancellor, he consents to act.[4] The crown is empowered to create not more than five ordinary judges of the Court of Appeal.[5] Persons qualified to be so appointed are barristers of not less than ten years' standing, persons qualified to be appointed Lords Justices of Appeal in Chancery, or persons who have held the office of Judge of the High Court for not less than one year. They are to be styled Lords Justices of Appeal.[6]

The following jurisdiction was given to the Court of Appeal:—[7]

(1) The jurisdiction and powers of the Lord Chancellor

[1] Darlow v. Shuttleworth, L.R. 1902, 1 K.B. 724-734, 732.
[2] 36, 37 Vict. c. 66 § 29. [3] 36, 37 Vict. c. 66 § 30.
[4] 36, 37 Vict. c. 66 § 6; 44, 45 Vict. c. 68 §§ 2 and 4; 54, 55 Vict. c. 53 § 1.
[5] 36, 37 Vict. c. 66 § 6; 39, 40 Vict. c. 59 § 15; 44, 45 Vict. c. 68 § 3.
[6] 36, 37 Vict. c. 66 § 8; 40 Vict. c. 9 § 4.
[7] 36, 37 Vict. c. 66 § 18; 53, 54 Vict. c. 44 § 1.

and Court of Appeal in Chancery, both as a court of equity and as a court of appeal in bankruptcy.

(2) The jurisdiction and powers of the court of Exchequer Chamber; together with jurisdiction to hear applications for a new trial or to set aside a verdict or judgment in the High Court.

(3) The jurisdiction of the Privy Council in respect of Admiralty and Lunacy Appeals.

(4) The jurisdiction and powers of the court of appeal in Chancery of the county palatine of Lancaster, and the jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster.

(5) The jurisdiction and powers of the court of the Lord Warden of the Stannaries.

We have seen that under the old practice at common law a suitor, if dissatisfied, might either (1) proceed by way of writ of error for errors on the record, or by writ of error on a bill of exceptions. If the court of error thought that there had been any misdirection, however trifling, it was bound to order a new trial. Or (2) he might move the court in banc for a new trial. From a refusal to grant a new trial there was no appeal.[1]

The Common Law Procedure Acts partially reformed the old law. The old writ of error was in the nature of a new proceeding. The Act of 1852 abolished the writ of error, and substituted a memorandum in error.[2] This memorandum in error was not a new proceeding; it was a step in the cause. After this Act, therefore, the parties proceded by memorandum in error on the record, or on a bill of exceptions. The Act also provided other ways of questioning the decision. The parties could bring error on a special case stated, or they could move for a new trial; and they could appeal to the Exchequer Chamber from the refusal to grant a new trial, unless the court were unanimous in such refusal. On such an appeal the court had larger powers than on a writ of error or a memorandum in error. They could take the whole circumstances into consideration, and, even though they thought that there had been misdirection, they could refuse a new trial if they considered that the misdirection was not in a material point. They could also, if they saw fit, give such judgment as ought to have been given in the court below.

[1] Above 89-92.

[2] First Report of the Commission for enquiring into the practice and procedure of the common law courts, Parliamentary Papers 1851, vol. xxii; 15, 16 Vict. c. 76 §§ 148, 149, 152, 157.

The Common Law Procedure Acts did not apply to proceedings on the revenue side of the Exchequer. Certain sections, however, were applied to such proceedings by the Queen's Remembrancer's Act.[1] That act allowed in revenue proceedings a memorandum in error on the record, or on a bill of exceptions, or on a special case stated. It did not allow an appeal from a refusal to grant a new trial.[2]

The Judicature Acts have simplified the law. Proceedings in error, whether on bills of exceptions, or otherwise, are abolished. All appeals and motions for a new trial are heard, as Chancery appeals have always been heard, by a rehearing of the case.[3] The provisions of the Judicature Acts as to appeals apply to revenue cases.[4]

The Judicature Acts provide that all appeals from any final order, decree, or judgment shall be heard by not less than three judges of the court, unless the parties consent to a hearing before two judges. If the parties consent to such a hearing, and the two judges differ in opinion, the case must, on the application of either party, be reargued before three judges of the court before appeal to the House of Lords. Appeals upon any interlocutory order, decree, or judgment must be heard by not less than two judges.[5]

Subject to these rules the court may sit in two divisions at the same time.[6]

It is provided that the jurisdiction in Lunacy, formerly vested in the Lords Justices of Appeal in Chancery, may be vested by the crown in any of the judges of the High Court or Court of Appeal.[7] Such jurisdiction is now vested in the Lords Justices of the Court of Appeal.

*The Appellate Jurisdiction Act.*

It was intended in 1873 to abolish the jurisdiction of the House of Lords as a final court of Appeal. If the Act of 1873 had been carried into effect as it was drawn and passed, the appellate jurisdiction of the House of Lords would have disappeared.[8] But the operation of the act was suspended till 1875;[9] and it was then allowed to become operative without the clauses affecting the jurisdiction of the House of Lords.

[1] 22, 23 Vict. c. 21. [2] Atty-General v. Sillem (1864) 10 H.L.C. 704.
[3] R.S.C. o. 58. First Report of the Judicature Commission, Parliamentry Papers 1868-69, vol. xxv. 20-22.
[4] R.S.C. o. 68 r. 2. The Supreme Court rules only apply to revenue cases so far as expressly provided, R.S.C. o. 68 rules 1 and 2.
[5] 38, 39 Vict. c. 77 § 12; 62, 63 Vict. c. 6.
[6] 38, 39 Vict. c. 77 § 12, now three divisions, 2 Ed. VII. c. 31 § 1.
[7] 38, 39 Vict. c. 77 § 7.
[8] 36, 37 Vict. c. 66 § 20. [9] 38, 39 Vict. c. 77 § 2.

The Appellate Jurisdiction Act was passed in 1876.[1] That act recognised and reformed the Appellate jurisdiction of the House of Lords. It also provided a scheme by which the House of Lords and the Judicial Committee of the Privy Council—the two highest courts of appeal in the British dominions—will eventually be, for the most part, composed of the same official members.

In order to increase the judicial strength of the Court it was provided that the Crown might appoint two persons to act as Lords of Appeal in Ordinary. They take rank and sit and vote as Barons during their life.[2] They hold their offices on the same terms as the other judges. Any barrister in England or Ireland, or any advocate in Scotland of fifteen years' standing, or any person who has held high judicial office for two years, is eligible for this office.[3] In the hearing of Admiralty appeals the House may require the assistance of nautical assessors.[4]

The House cannot hear any appeal unless not less than three of the following persons are present:—The Lord Chancellor, the Lords of Appeal in Ordinary, or such peers of Parliament as are holding or have held high judicial office.[5] The House may sit to hear appeals during a prorogation, and, if the Crown by sign manual warrant so direct, during a dissolution of Parliament.[6]

Appeals lie to the House of Lords from the Court of Appeal in England, and from any court in Scotland or Ireland from which error or appeal lay to the House of Lords immediately before the passing of the Appellate Jurisdiction Act.[7]

The Act requires that, "every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before His Majesty the King in his court in Parliament, in order that the said court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject matter of such appeal.[8]

In order to assimilate the official staff of the Judicial Committee with that of the House of Lords the Act pro-

[1] 39, 40 Vict. c. 59. [2] 39, 40 Vict. c. 59 § 6; 50, 51 Vict. c. 70 § 2.
[3] 39, 40 Vict. c. 59 § 25, and 50, 51 Vict. c. 70 § 5. High Judicial Office is defined to be one of the following offices:—Lord Chancellor of Great Britain or Ireland, or member of the Judicial Committee of the Privy Council, or Lord of Appeal in Ordinary, or Judge of one of the superior courts of Great Britain or Ireland. [4] 54, 55 Vict. c. 53 § 3. [5] 39, 40 Vict. 59 § 5.
[6] 39, 40 Vict. c. 59 §§ 8 and 9; 50, 51 Vict. c. 70 § 1, allows a Lord of Appeal to take his seat during a prorogation. [7] 39, 40 Vict. c. 59 § 3. [8] § 4.

vides that, "whenever any two of the paid judges of the Judicial Committee of the Privy Council have died or resigned, His Majesty may appoint a third Lord of Appeal in Ordinary . . . and on the death or resignation of the remaining two paid judges of the Judicial Committee of the Privy Council, His Majesty may appoint a fourth Lord of Appeal in Ordinary."[1] Inasmuch as those Lords Justices of Appeal who are members of the Privy Council, are members of the Judicial Committee,[2] the official staff of the two courts is not identical. But it is clear that for practical purposes they will be constituted in the same way.

The English judicial system has thus been completely remodelled. As a necessary consequence the Judicature Acts have provided a simplified code of procedure adapted to all branches of the Supreme Court; and they have given to the judges of the Supreme Court a power to make such new rules as may from time to time be required.[3] So far as possible the strong points of the various systems of procedure in force in the various courts merged in the Supreme Court have been adopted.[4] The aim of the new code of procedure is to preserve so far as possible the advantages of the old system of pleading without its rigidity. To ensure a clear statement of the issues of fact and law before the court, and yet to make it impossible that a suitor with a good case should lose his case merely by a fault in its statement. This aim has been in a great measure fulfilled. The distinguishing characteristic of older systems of procedure, and of procedure in England as it continued until the reforms of the 19th century, was that "one could say next to nothing about actions in general, while one could discourse at great length about the mode in which an action of this or that sort was to be pursued and defended."[5] Now we have a law about actions in general; and it can be said that "it is not possible for an honest litigant to be defeated by any mere technicality, any slip, any mistaken step in his litigation. . . . Law has ceased to be a scientific game, that may be won or lost by playing some particular move."[6]

Just as the courts, and their jurisdiction, and procedure have been remodelled, so has the official staff attached to

[1] 39, 40 Vict. c. 59 § 14. [2] 44, 45 Vict. c. 3.
[3] 36, 37 Vict. c. 66 § 23 and Schedule of Rules; 39, 40 Vict. c. 59 § 17; 44, 45 Vict. c. 68 § 19; 56, 57 Vict. c. 66; 57, 58 Vict. c. 16 § 4.
[4] See Phillimore, Eccl. Law, 956, 957, as to the contributions made by the procedure of the Ecclesiastical Courts.
[5] P. and M. ii 560. [6] Bowen, L.J., Administration of the Law, etc., 310.

them. A commission appointed to enquire into the administrative departments of the Courts of Justice issued two reports in 1874. The second report contains an elaborate history of these departments.[1] It recommended that one general department should be formed, in place of the separate departments formerly attached to the different courts. This recommendation was followed. In 1879[2] was established the central office of the Supreme Court, in which was merged the existing official staff. This act now regulates the duties and the tenure of these officials.

The law reforms of the century were fitly symbolized by the opening in 1884 of the new Royal Courts of Justice. All branches of the Supreme Court, and the offices connected with it, are now housed under one roof.

The 19th century has seen many acts which have codified branches of English law. A good codifying act sifts the mass of material accumulated in the course of a long historical development, and restates, in clear propositions, the essence of principles and rules, which the process of gradual growth had rendered it difficult to discover. The Judicature Acts may be said to have codified the English judicial system. Taking as their basis the courts which had for centuries administered, and by administering had created, the various branches of English law, they have rearranged them on a simpler plan. They have provided them with a uniform code of procedure, and an adequate official staff. Without sacrificing what was valuable in the forms and machinery of the past, they have provided a system suited to the needs of the present.

[1] Parliamentary Papers 1874, vol. xxiv.

[2] 42, 43 Vict. c. 78. Cp. Covington v. Metropolitan Rly., L.R. 1903, 1 K.B. at p. 235.

## CHAPTER IX

## THE NEW COUNTY COURTS

WE have seen how the local courts—communal, feudal, franchise and manorial — were worsted in the struggle for existence by the royal courts of justice.[1] We have seen how the court of Requests, established to meet the needs of poor suitors, suffered the same fate.[2] The result was, that in the 18th century, practically all the judicial work of the country was done by the judges of the Common Law Courts, the Lord Chancellor, or the Master of the Rolls. So perfect a centralization of justice was obviously productive of great inconvenience. To the poor man it was almost a denial of justice, since it made the recovery of a small debt a piece of extravagance, which only the very rich or the very litigious could think of incurring. The need for small courts, with a simple procedure for small cases has, in fact, at all periods in the history of our law been too obvious to escape notice. Coke[3] noticed it as one of the advantages of the old hundred and county courts and courts baron. In certain towns small courts called courts of Request were established in the 18th century.[4]

Long before the 18th century London had set the example. In Henry VIII.'s reign a court of this nature had been established by act of the common council. It was placed upon a legal basis by a statute of James I.'s reign,[5] and its constitution was amended in George II.'s reign.[6] In the latter reign, and in the reign of George III., other towns and districts obtained similar courts.[7] Their jurisdiction was limited to causes of debt not exceeding 40s. in value. The judges proceeded in a summary way by examination of the parties, as well as of other witnesses. The popularity of these courts was great. It was said by a judge of 15 years' experience in the Birmingham court that 130 causes a week

[1] Above, chap. ii. [2] Above 209-211. [3] 4th Instit. 267, 268.
[4] Bl. Comm. iii 81-83. The name is evidently derived from the court which dealt out equity to poor suitors, Select Cases in the Court of Requests (S.S.) liii, liv.
[5] 3 Jac. I. c. 15. [6] 14 Geo. II. c. 10. [7] Bl. Comm. iii 82 n. k.

were decided there.[1] Blackstone says that "the anxious desire, that has been shown to obtain these several acts, proves clearly that the nation in general is truly sensible of the great inconvenience, arising from the disuse of the ancient county and hundred courts." He did not, however, altogether approve of these courts of Request, because they did not try cases by jury, and in other respects departed from the procedure sanctioned by the common law.

The county courts for Middlesex, introduced in George II.'s reign, are the forerunners of the new county courts of the 19th century.[2] They were courts held in every hundred of Middlesex by the county clerk. The cases were tried by the county clerk and a jury of twelve freeholders in a summary way. The amount at issue in the cause was not to exceed 40s. This was the plan which Blackstone advocated as "entirely agreeable to the constitution and genius of the nation."

It was not till 1846, more than 70 years after Blackstone wrote, that this suggestion was carried into effect.[3] The Act of 1846[4] created an entirely new set of courts, and, "agreeable to the constitution and genius of the nation," it provided for these courts a name and style of great antiquity. "Whereas," runs the Act, "the county court is a court of ancient jurisdiction, having cognisance of all pleas of personal actions to any amount by virtue of a writ of justicies issued in that behalf; and whereas the proceedings in the county court are dilatory and expensive, and it is expedient to alter and regulate the manner of proceeding in the courts for the recovery of small debts and demands (i.e. the courts of Request) and that the courts established under the recited Acts of Parliament . . . should be holden after the passing of this Act as branches of the county court," it is enacted that certain county courts of a new model be established.

With the manufacture of history we touch the limits of even a sovereign legislature. These new tribunals have the name alone of the ancient county court. Their powers, their jurisdiction, their procedure are as modern as the courts themselves. But, even in the modern statutes which create them, we can see traces of the period when there were many local courts of various kinds. If the name of these new courts, and the preamble to the statute, takes us back to the old communal courts, the saving to the lords of certain

[1] Hutton, Courts of Request, 11 (Ed. 1787).
[2] 23 Geo. II. c. 33; Bl. Comm. iii 82, 83.
[3] For the history of various attempts in this direction see the *Nineteenth Century* (October 1897) 560.
[4] 9, 10 Vict. c. 95.

manors, hundreds, and liberties of the right to make the first appointment to the post of county court judge, and the proviso that such lords may surrender their jurisdiction, take us back to the days when private jurisdiction was a competitor to royal justice.[1]

Under this Act England and Wales are divided into 500 districts. These districts are divided into 59 circuits. As a general rule each circuit has a judge, and each district has a court held at least once a month. The judges are appointed by the Lord Chancellor, and must be barristers of at least ten years' standing.

The judge may determine all questions of law and fact. But if the amount at issue is over £5 either party may require a jury of five; if the amount is under that sum the judge may in his discretion allow a jury on the application of either party.[2]

The chief object of the Act of 1846 was to create courts for the more easy recovery of small debts. Their jurisdiction was limited to cases where the debt or damage claimed did not exceed £20. Certain classes of action they were altogether prevented from entertaining. But the courts succeeded so well that successive acts have added successive powers, until it has become possible to describe the county court judge as a "judicial beast of burden," and the county court as the "devil" of the High Court.[3] Under the consolidating Act of 1888,[4] the county courts can entertain any common law action with the consent of both parties; any action founded on contract (except breach of promise of marriage) or any action founded on tort (except libel, slander or seduction) up to the limit of £50; and any question as to the title to real property if the annual value of the property does not exceed £50. They have Equity jurisdiction if the cause of action does not exceed £500; Probate jurisdiction if the estate in question does not exceed £200 personalty and £300 realty. They have Admiralty jurisdiction if the amount at issue does not exceed £300. They have jurisdiction in replevin and bankruptcy to any amount. In actions on contract, transferred from the High Court, they have jurisdiction up to £100; in actions on tort, similarly transferred, they have jurisdiction to any amount. They can wind up all companies whose capital does not exceed £10,000.[5]

[1] 9, 10 Vict. c. 95 §§ 11, 13, 14; 51, 52 Vict. c. 43 § 6.
[2] L.Q.R. iii 1-13. [3] L.Q.R. vii 346-348, 350. [4] 51, 52 Vict. c. 43.
[5] L.Q.R. v 3; vii 346-348.

In addition to this other Acts have given them duties of a very heterogeneous kind.[1] Statistical tables and diagrams show that by far the larger number of cases decided in this country are settled in the new county courts.[2]

Such has been their success that schemes of reorganization and reform are already in the air. A reorganization of jurisdiction involving a further division between petty and important cases; a rearrangement of the circuits according to the latest census tables and Bradshaw are advocated.[3] But over schemes which belong to the future the historian has no jurisdiction.

[1] E.g. The Agricultural Holdings Act 1883; the Coal Mines Regulation Act 1887; the Employers Liability Act 1880; Guardianship of Infants Act 1886; Friendly Societies Act 1875; Habitual Drunkards Act 1879; Settled Land Acts 1882-1890; Tithe Act 1891; Workmen's Compensation Act 1897.

[2] *Nineteenth Century* (October 1897) 574, 575.

[3] L.Q.R. iii 3; v 6-10; vii 350-353; ix 321-330.

# APPENDIX

## I

### The Grand Assize

Rex vicecomiti salutem. Prohibe N. ne teneat placitum in curia sua quod est inter M. et R. de una hida terræ in illa villa, quam idem R. clamat versus prefatum M. per breve meum nisi duellum inde vadiatum fuerit, quia M. qui tenens est, posuit se inde in assisam meam, et petit recognitionem fieri, quis eorum majus jus habeat in terra illa. Teste etc. Glanvil II 8.

Rex vicecomiti salutem. Summone per bonos summonitores, quatuor legales milites de viseneto de Stoke quod sint ad clausum Paschæ, coram me vel Justitiis meis apud Westmonasterium ad eligendum super sacramentum suum xii legales milites de eodem viseneto, qui melius veritatem sciant, ad recognoscendum super sacramentum suum, utrum M. an R. majus jus habeat in una hida terræ in Stoke quam R. clamat versus M. per breve meum, et unde M., qui tenens est, posuit se in assisam meam et petit recognitionem fieri, quis eorum majus jus habeat in terra illa, et nomina eorum imbreviari facias. Et summone per bonos summonitores M. qui terram illam tenet, quod tunc sit ibi auditurus illam electionem, et habeas ibi summonitores etc. Teste etc. Glanvil II 11.

## II

### The Assize Utrum

Rex vicecomiti salutem. Summone per bonos summonitores duodecim liberos et legales homines de visineto de illa villa quod sint coram me vel Justitiis meis eo die parati sacramento recognoscere, utrum una hida terræ quam N. persona ecclesiæ de illa villa clamat ad liberam Elemosinam ipsius ecclesiæ suæ versus R. in illa villa sit laicum fœdum ipsius R. an fœdum ecclesiasticum. Et interim terram illam videant et nomina eorum imbreviari facias. Et summone per bonos summonitores predictum R. qui terram illam tenet quod tunc sit ibi auditurus illam recognitionem. Et habeas ibi etc. Teste etc. Glanvil XIII 24.

## III

### The Possessory Assizes

*A. Novel Disseisin.*

Rex vicecomiti salutem. Questus est mihi N. quod R. injuste et sine judicio disseisivit eum de libero tenemento suo in illa villa, post ultimam transfretationem meam in Normaniam. Et ideo tibi precipio quod si

prefatus N. fecerit te securum de clamore suo prosequendo tunc facias tenementum illud reseisiri de catallis quæ in eo capta fuerunt, et ipsum tenementum cum catallis esse facias in pace usque ad clausum Paschæ, et interim facias duodecim liberos et legales homines de visineto videre terram illam et nomina eorum imbreviari facias et summone illos per bonos summonitores quod tunc sint coram me vel Justitiis meis parati inde facere recognitionem. Et pone per vadium et salvos pledgios predictum R. vel ballivum suum si ipse non fuerit inventus, quod tunc sit ibi auditurus illam recognitionem. Et habeas ibi etc. Teste etc.
GLANVIL XIII 33.

*B. Morte D'Ancestre.*

Rex vicecomiti salutem. Si G. filius T. fecerit te securum de clamore suo prosequendo tunc summone per bonos summonitores duodecim liberos et legales homines de visineto de illa villa quod sint coram me vel Justitiis meis eo die parati sacramento recognoscere si T. pater predicti G. fuit seisitus in dominico suo sicut de fœdo suo de una virgata terræ in illa villa die qua obiit, si obiit post primam coronationem meam, et si ille G. propinquior heres ejus est, et interim terram illam videant, et nomina eorum imbreviari facias, etc. Summone per bonos summonitores R. qui terram illam tenet, quod tunc sit ibi auditurus illam recognitionem. Et habeas ibi summonitores etc. Teste etc. GLANVIL XIII 3.

*C. Darrein Presentment.*

Rex vicecomiti salutem. Summone per bonos summonitores duodecim liberos et legales homines de visineto de villa illa quod sint coram me vel Justitiis meis eo die parati sacramento recognoscere quis advocatus presentavit ultimam personam, qui obiit, ad ecclesiam de illa villa quæ vacans est, ut dicitur; et unde N. clamat advocationem, et nomina eorum imbreviari facias. Et summone per bonos summonitores R. qui presentationem ipsam deforciat, quod tunc sit ibi auditurus illam recognitionem, et habeas etc. Teste etc. GLANVIL XIII 19.

## IV

### WRIT OF DEBT

Rex vicecomiti salutem. Præcipe N. quod juste et sine dilatione reddet R. centum marcas quas ei debet ut dicit; et unde queritur quod ipse ei injuste deforciat, et nisi fecerit summone eum per bonos summonitores quod sit coram me vel Justitiis meis apud Westmonasterium a clauso Paschæ in quindecim dies, ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste etc. GLANVIL X 2.

## V

### WRIT OF RIGHT

*A. To the Sheriff.*

Rex vicecomiti salutem. Præcipe A. quod juste et sine dilatione reddet B. unam hidam terræ in villa illa unde idem B. queritur quod prædictus A. ei deforciat, et nisi fecerit summone eum per bonos summonitores quod sit ibi coram me vel Justitiis meis in crastino post octabis clausi Paschæ apud locum illum, ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste etc. GLANVIL I 6.

*B. To the Lord of the Land.*

George II. by the grace of God of Great Britain, France, and Ireland, king, etc., to Willoughby earl of Abingdon greeting. We command you that without delay you hold full right to William Kent esquire, of one messuage and twenty acres of land with the appurtenances in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allan deforces him. And unless you so do let the sheriff of Oxfordshire do it, that we no longer hear complaint thereof for defect of right. Witness etc.

BL. COMM. III App. no. 1 § 1.

*C. To the Sheriff Quia Dominus Remisit Curiam.*

George II. by the grace of God etc. to the sheriff of Oxfordshire greeting. Command William Allan that he justly and without delay render unto William Kent one messuage and twenty acres of land with the appurtenances in Dorchester, which he claims to be his right and inheritance, and whereupon he complains that the aforesaid Richard unjustly deforces him. And unless he shall so do, and if the said William shall give you security of prosecuting his claim, then summon by good summoners the said Richard that he appear before our Justices at Westminster on the morrow of All Souls to show wherefore he hath not done it. Witness ourself etc. Because Willoughby earl of Abingdon, the chief lord of that fee, hath thereupon remised unto us his court.

BL. COMM. III App. no. 1 § 4.

## VI

### JUSTICIES

Rex vicecomiti salutem. Præcipio tibi quod Justicies N. quod juste et sine dilatione faciat R. consuetudines et recta servitia quæ ei facere debet de tenemento suo quod de eo tenet in illa villa sicut rationabiliter monstrare poterit eum sibi deberi, ne oporteat eum amplius inde conqueri pro defectu recti. Teste etc. GLANVIL IX 9.

## VII

### PONE

Rex vicecomiti salutem. Pone coram me vel Justitiis meis die illo loquelam quæ est in comitatu tuo inter A. et N. de una hida terræ in illa villa quam ipsa A. clamat versus predictum N. ad rationabilem dotem suam. Et summone per bonos summonitores predictum N., qui terram illam tenet, quod tunc sit ibi cum loquela sua. Et habeas ibi etc. Teste etc. GLANVIL VI 7.

## VIII

### TOLT

Charles Morton Esquire sheriff of Oxfordshire to John Long bailiff errant of our lord the king and of myself greeting. Because by the complaint of William Kent Esquire personally present at my county court, to wit, on Monday the 6th day of September in the thirtieth year of the reign of our lord George the second by the grace of God etc., at Oxford in the shire house there holden, I am informed, that although he himself by

the writ of our said Lord the King of right patent directed to Willoughby earl of Abingdon, for this that he should hold full right to the said William Kent of one messuage and twenty acres of land with the appurtenances in Dorchester within my said county, of which Richard Allan deforces him, hath been brought to the said Willoughby earl of Abingdon; yet for that the said Willoughby earl of Abingdon favoureth the said Richard Allan in this part, and hath hitherto delayed to do full right according to the exigence of the said writ, I command you on the part of our said lord the king, firmly enjoining, that in your proper person you go to the court baron of the said Willoughby earl of Abingdon at Dorchester aforesaid, and take away the plaint, which there is between the said William Kent and Richard Allan by the said writ, into my county court to be next holden, and summon by good summoners the said Richard Allan, that he be at my county court on Monday the fourth day of October next coming at Oxford in the shire house there to be holden, to answer to the said William Kent thereof. And have you there then the said plaint, the summoners, and this precept. Given in my county court at Oxford in the shire-house, the sixth day of September, in the year aforesaid. BL. COMM. III App. no. 1 § 2.

## IX

### FALSE JUDGMENT

*A. From the County Court.*

Henricus etc. vicecomiti salutem. Si A. te fecerit securum de clamore suo prosequendo tunc in pleno Comitatu tuo recordum facias loquelam quæ est in eodem Comitatu per breve nostrum de recto inter A. petentem et B. tenentem de uno mesuagio et centum acris terræ cum pertinentiis in C. unde idem A. queritur falsum sibi factum fuisse judicium in eodem Comitatu; et recordum illud habeas coram Justitiis nostris apud Westmonasterium tali die sub sigillo tuo, et per quatuor legales milites ejusdem Comitatus ex illis qui Recordo illi interfuerunt; et summone per bonos summonitores prædictum B. quod tunc sit ibi auditurus Recordum illud; et habeas ibi summonitores, nomina quatuor militum, et hoc breve.

F.N.B. 18 B.

*B. From the Court Baron—Accedas ad curiam*

Rex vicecomiti salutem. Si A. fecerit te securum de clamore suo prosequendo, tunc assumptis tecum quatuor discretis et legalibus Militibus de Comitatu tuo, in propria persona tua accedas ad curiam B. de C. et in plena curia illa recordum facias loquelam quæ fuit in eadem curia per breve nostrum de recto inter A. petentem et B. tenentem de uno mesuagio etc. Unde A. queritur falsum sibi factum fuisse judicium in eadem curia; et recordum illud habeas coram Justitiis nostris apud Westmonasterium tali die sub sigillo tuo, per quatuor legales homines ejusdem curiæ ex illis qui Recordo illi interfuerunt; et summone etc [as in A.] et habeas ibi nomina prædictorum quatuor hominum et hoc breve.

F.N.B. 18 D.

## X

### WRIT OF ERROR

*A. To remove a case into the King's Bench.*

George II. by the Grace of God etc. To our trusty and beloved Sir John Willes knight greeting. Because in the record and process, and

also in the giving of judgment, of the plaint which was in our court before you and your fellows our Justices of the bench, by our writ between William Burton gentleman and Charles Long late of Burford in the county of Oxford gentleman, of a certain debt of Two hundred pounds, which the said William demands of the said Charles, manifest error hath intervened, to the great damage of him the said William, as we from his complaint are informed: we, being willing that the error if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the plaint aforesaid, with all things concerning them, and this writ; so that we may have them from the day of Easter in fifteen days, wheresoever we shall then be in England: that the record and process aforesaid being inspected, we may cause to be done thereupon, for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. Witness etc. BL. COMM. III. App. no. 3 § 6.

*B. To remove a case from the King's Bench into Parliament.*

Rex etc. dilecto et fideli nostro W. S. Militi, Capitali Justitio nostro ad placita coram nobis tenenda assignato, salutem. Quia in Recordo et Processu, ac etiam in reversatione et revocatione judicii in Curia nostra coram nobis de querela et judicio in Curia nostra de Banco coram F.N. milite et sociis suis Justitiis nostris de Banco, per breve nostrum inter J. S. et E. B. de placito Transgressionis et Ejectionis firmæ eidem J. per præfatum E. fieri supponiti, unde in eadem Curia nostra de Banco consideratum fuit quod prædictus J. nihil caperet per breve suum prædictum, sed esset in misericordia pro falso clamore suo inde, et quod idem E. iret sine die. Necnon in redditione Judicii pro eodem J. in Curia nostra coram vobis versus eundem E. super revocationem judicii prædicti ut dicitur error intervenit manifestus ad grave damnum ipsius E. sicut ex querela sua accepimus. Nos errorem si quis fuit modo debito corrigi et partibus prædictis plenam et celerem Justitiam fieri volentes in hac parte, vobis mandamus, quod si Judicium prædictum in Curia nostra de Banco prædicto, ut præfertur, redditum, in Curia nostra coram nobis revocatum et adnullatum existit, tunc Recordum et Processus judicii prædicti in revocationem ejusdem cum omnibus ea tangentibus in præsens Parliamentum nostrum distincte et aperte sine dilatione mittatis, et hoc breve, ut, inspectis recordo et processu prædictis ulterius inde de assensu Dominorum Spiritualium et temporalium in eodem Parliamento existentium pro errore illo corrigendo fieri faciamus quod de Jure et secundum legem et consuetudinem Regni nostri Angliæ fuerit faciendum. Teste etc. REGISTER (4th Ed. 1687) App. 38.

## XI

### SCIRE FACIAS

*A.* Rex vicecomiti salutem. Cum I. filius C. primo die Julii anno regni domini E. nuper regis avi nostri decimo in cancellaria sua recognoverit se debere B. et D. £20 unde eis solvisse debuit in festo Natalis domini tunc proximo futuro 100/- et in festo tali 100/- et in festo tali tunc proxime sequenti £10, sicut per inspectionem rotulorum cancellariæ dicti avi nostri nobis constat, et eas ei nondum solvit, ut dicitur, ac iidem B. et D. juxta statutum inde editum elegerint sibi liberari pro

prædictis viginti libris omnia catalla et medietatem terræ ipsius I. filii C. tenendam juxta formam statuti prædicti: Tibi præcipimus quod scire facias præfato I. filio C. quod sit in cancellaria nostra tali die ubicumque fuerimus in Anglia, ad ostendendum si quid pro se habeat vel dicere sciat quare omnia catalla sua et medietas terræ suæ præfatis B. et D., vel eorum alteri, pro prædictis viginti libris liberari non debeant, juxta formam statuti prædicti. Et habeas ibi nomina illorum per quos ei scire feceris et hoc breve. Teste etc. REGISTER (4th Ed. 1687) 298 b, 299.

*B.* Rex vicecomiti salutem. Cum P. in curia domini Edwardi nuper regis Angliæ patris nostri coram justiticariis nostris apud Westmonasterium, per considerationem ejusdem curiæ nostræ recuperasset versus T. £20 et etiam 20/- pro damnis suis quæ habuit occasione detentionis debiti prædicti: Prædictus T. prædictas viginti libras eidem P. nondum reddidit, prout ex gravi querela ipsius P. accepimus. Et quia volumus ea quæ in curia prædicti patris nostri rite acta sunt debitæ executioni demandari: Tibi præcipimus quod per probos etc. scire facias prædicto T. quod sit coram nobis ubicumque fuerimus in Anglia ostensurus, si quid pro se habeat vel dicere sciat, quare prædictæ viginti libræ et etiam prædicti viginti solidi de terris et catallis suis in balliva tua fieri, et prædicto P. reddi, non debeant, si sibi viderit expedire. Et habeas etc. [as in A.]. Teste etc. REGISTRUM JUDICIALE 12.

## XII.

### *A.* PROHIBITION

(1) *To the Ecclesiastical Court.*

Rex judicibus illis ecclesiasticis salutem. Indicavit nobis R. quod cum I. clericus suus teneat ecclesiam illam in illa villa per suam presentationem, quæ de sua advocatione est, ut dicitur, N. clericus eandem patens ex advocatione M. militis, ipsum I. coram vobis in curia Christianitatis inde trahit in placitum. Si vero prefatus N. ecclesiam illam diracionaret ex advocatione predicti M., palam est quod jam dictus R. jacturam inde incurrerat de advocatione sua. Et quoniam lites de advocationibus ecclesiarum ad coronam et dignitatem meam pertinent, vobis prohibeo ne in causam illam procedatis donec diracionatum fuerit in curia mea ad quem illorum advocatio illius ecclesiæ pertineat. Teste etc. GLANVIL IV. 13.

*Writ to the sheriff if the foregoing be disobeyed.*

Rex vicecomiti salutem. Prohibe judicibus illis ne teneant placitum in curia Christianitatis de advocatione illius ecclesiæ, unde R. advocatus illius ecclesiæ queritur quod N. inde eum trahit in placitum in curia Christianitatis quia placita de advocationibus ecclesiarum ad coronam et dignitatem meam pertinent. Et summone per bonos summonitores ipsos Judices quod sint coram me vel Justitiis meis eo die ostensuri quare placitum id tenuerunt contra dignitatem meam in curia Christianitatis. Summone etiam per bonos summonitores prefatum N. quod tunc sit ibi ostensurus quare prefatum R. inde traxerit in placitum in curia Christianitatis. Et habeas ibi etc. Teste etc. GLANVIL IV. 14.

(2) *To the Court of Admiralty.*

Edwardus sextus dei gracia Anglie Francie et Hibernie Rex fidei defensor et in terra Ecclesie Anglicane et Hibernice supremum caput, Griffino Leson legum doctori commissario curie admirallitatis et deputato nobilis et prepotentis viri domini Thome Seymer preclari ordinis garterii

militis domini Seymour de Sudley magni Admiralli Anglie Hibernie Wallie Calicie et Bolonie et marchiarum eorundem Normanie Gasconie Acquitanie alio-ve judici in hac parte competenti cuicumque, Salutem. Ostensum est nobis nuper in curia nostra coram nobis ex gravi querela Thome Spycer Thome Mannyng Johannis Edmonds Roberti Edmonds Johannis Marrett Walteri Edde Johannis Johnson Johannis Hynd Johannis Buckytt et Willielmi Baynard quod cum in statuto in parliamento domini Ricardi nuper Regis Anglie secundi post conquestum apud Westmonasterium anno regni sui tertio-decimo edito inter cetera contineatur quod Admiralli et eorum deputati se de aliqua re infra regnum Anglie facta nisi solummodo de re super mare facta prout tempore domini Edwardi nuper regis Anglie progenitoris nostri debite usum fuerat nullatenus intromitterent; Cumque eciam in parliamento dicti domini Ricardi apud Westmonasterium anno regni sui quinto-decimo tento inter cetera declaratum ordinatum et stabilitum existit quod de omnibus contractibus placitis et querelis ac de omnibus aliis rebus factis sive emergentibus infra corpus comitatus tam per terram quam per aquam ac eciam de wrecco maris curia Admiralli nullam habeat cognicionem potestatem nec jurisdiccionem sed sint omnia hujusmodi contractus placita et querele ac omnia alia emergentia infra corpora comitatuum tam per terram quam per aquam (ut predictum est) ac eciam wreccum maris triata terminata discussa et remediata per leges terre et non coram Admirallo nec per Admirallum nec ejus locum tenentem quovismodo; Quidam tamen Edwardus Cleyton firmarius serenissime domine Anne de Cleva domine et (ut asserit) proprietarie tam dominii de Boyton in comitatu Suffolcie ac cujusdam rivuli fluvialis fluminis-ve et aque sive crece maris juxta Boyton predictam existentis, statuta et leges predicta minime ponderans nec verens, sed contra eadem machinans, dictos Thomam Thomam Johannem Robertum Johannem Walterum Johannem Johannem Johannem et Willielmum contra debitam legis regni nostri Anglie formam, et contra vim formam tenorem et effectum statutorum illorum indebite pergravare opprimere et fatigare ipsos Thomam Thomam Johannem Robertum Johannem Walterum Johannem Johannem Johannem et Willielmum in curia admirallitatis coram vobis apud Suthwerck in comitatu Surreie, asserendo et libellando de et pro eo quod predicti Thomas Thomas Johannes Robertus Johannes Walterus Johannes Johannes Johannes et Willielmus mensibus Marcii Aprilis Maii Junii Julii Augustii Septembris Octobris Novembris Decembris Januarii Februarii et Marcii anno domini millesimo quingentesimo quadragesimo sexto eorum-ve mensium, quolibet pluribus sive aliquo, cum eorum cimbis rethibusque et aliis piscium capiendorum instrumentis suis in dicto rivulo flumine aqua sive creca (supponendo ut supradictum est dictam dominam Annam esse proprietariam rivuli sive aque illius) absque licentia dicte domine Anne, aut firmarii sui, antedicti piscati fuerant ac pisces inde ad valenciam sexaginta librarum ceperant et habuerant, caute et subdole libellando quod rivulus flumen aqua sive creca predicta infra fluxum et refluxum maris ac infra jurisdiccionem marittimam curie Admirallitatis predicte fore, ubi revera rivulus flumen aqua sive creca illa infra corpus comitatus Suffolcie et extra jurisdiccionem Admirallitatis existit, traxit in placitum Ac ipsos Thomam Thomam Johannem Robertum Johannem Walterum Johannem Johannem Johannem et Willielmum in curia Admirallitatis antedicte comparere ad inde eidem Edwardo respondendum astrinxit, ac eos eo pretextu per diffinitivam dicte Curie Admiralittatis sentenciam condempnari totis suis viribus conatur, et indies machinatur, in nostri

contemptum et ipsorum Thome Thome Johannis Roberti Johannis Walteri Johannis Johannis Johannis et Willielmi dampnum prejudicium depaupertacionem et gravamen manifesta ac contra formam statutorum predictorum. Unde nobis supplicaverunt iidem Thomas Thomas Johannes Robertus Johannes Walterus Johannes Johannes Johannes et Willielmus eis remedium in hac parte provideri festinum; Et Nos jura corone nostre regie prout vinculo juramenti astringimur manutenere volentes, et contra eadem nolentes ligeos nostros suspencionibus violari illicitis, vobis prohibimus et precipimus ne placitum predictum premissa aliqualiter tangens coram vobis ulterius teneatis, nec quicquam inde attemptetis seu attemptari permittatis aut procuretis quod in nostri contemptum aut ipsorum Thome Thome Johannis Roberti Johannis Walteri Johannis Johannis Johannis et Willielmi dampnum prejudicium seu gravamen quoquo modo cedere valeat, sub violatoris legis nostre penam periculo incurrendi sentenciam seu decretum, si que in ipsos Thomam Thomam Johannem Robertum Johannem Walterum Johannem Johannem Johannem et Willielmum fulminaveritas seu fulminari fecistis quovismodo, eis et eorum cuilibet relaxantes et ipsos penitus absolventes de eisdem periculo incumbente Teste Ricardo Lyster apud Westmonasterium XXV die Januarii anno regni nostri primo.

Per curiam

ROOPER.

SELECT PLEAS OF THE ADMIRALTY (S.S.) ii 3.

(3) *Modern form.*

Edward VII. by the grace of God etc. to the [judge of the County Court holden at ] and to [*name of plaintiff*] of , greeting: Whereas we have been given to understand that you the said have [entered a plaint against] C. D. in the said court, and that the said court has no jurisdiction in the said [cause] or to hear and determine the said [plaint] by reason that [*state facts showing want of jurisdiction*].

We therefore hereby prohibit you from further proceeding in the said [action] in the said court. Witness etc.

*B.* CONSULTATION.

Rex officiali curiæ Cantuariensis et ejus commissariis salutem. Monstravit nobis A. quod cum ipsa petat coram vobis in curia Christianitatis executionem cujusdam sententiæ in causa testamentaria, pro ipsa A. et contra T. executorem testamenti B. matris predictæ A. super quadraginta libris in testamento predictæ B. eidem A. legatis, per officialem episcopi Londoniensis latæ, et post modum per vos confirmatæ: dictus T. executionem sententiæ predictæ satagens impedire, breve nostrum de prohibitione, ne placitum de catallis et debitis quæ non sunt de testamento vel matrimonio in curia Christianitatis teneretis, vobis dirigi procuravit: cujus brevis pretextu vos executioni sententiæ memoratæ supersedistis hucusque; ad grave damnum ipsius A. et præjudicium manifestum. Et quia per dictum breve nostrum non prohibetur, quin de catallis in testamento legatis agi possit in curia Christianitatis, nolentes jurisdictionem quæ ad forum ecclesiasticum pertinet taliter impediri: vobis significamus, quod in causa, ubi petitur ab executore legatum sub nomine legati in testamento relictum, procedere poteritis, et ea facere quæ ad forum ecclesiasticum noveritis pertinere, prohibitione nostra predicta non obstante. Teste etc.

REGISTER (4th Ed. 1687) 45 A.

## XIII

### CERTIORARI

*A. Old Forms.*

Rex vicecomiti salutem. Quia quibus libet certis de causis certiorari velimus super Recordo et Processu cujusdam inquisitionis factæ coram te et custodibus Placitorum Coronæ nostræ in Comitatu tuo apud N. per breve nostrum super quadam rediseisina I. per R. facta, ut dicitur, de uno Messuagio cum pertinenciis in N., Tibi præcipimus, quod si judicium inde redditum sit, tunc Recordum et Processum prædicta cum omnibus ea tangentibus nobis sub sigillo tuo distincte et aperte mittas, et hoc breve, ita quod ea habeamus tali die ubicunque tunc fuerimus in Anglia, ut inspectis Recordo et Processu prædictis ulterius inde fieri faciamus quod de jure et secundum legem et consuetudinem regni nostri Angliæ fuerit faciendum. Teste etc. F.N.B. 242 B.

Rex etc. Quia quibusdam certis de causis Certiorari volumus super Recordo et Processu cujusdam inquisitionis captæ coram dilectis et fidelibus nostris W. et P. Justitiis nostris ad Gaolam nostram de N. assignatis deliberandam, pro morte E. unde C. pro morte predicto rectatus fuit, ut dicitur, quæ quidem Recordum et Processus coram vobis certis de causis venire fecimus, quæ penes vos resident, ut dicitur; vobis mandamus quod Recordum et Processus prædicta cum omnibus eo Tangentibus nobis sub sigillis vestris distincte etc. F.N.B. 245 F.

*B. Modern Form.*

Edward VII. by the grace of God etc. To the greeting: We, willing for certain causes to be certified of , command you that you send to us in our High Court of Justice on the day of , the aforesaid, with all things touching the same, as fully and entirely as they remain in , together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness etc.

## XIV

### QUO WARRANTO

Rex Vicecomiti salutem. Summone per bonos summonitores A. quod sit coram justitiariis nostris apud Westmonasterium tali die, ostensurum quo warranto tenet visum francpledgii in villa de R. in prejudicium hundredi nostri de B. sine licencia et voluntate nostra vel predecessorum nostrorum quondam regum Angliæ, et emendas pro transgressione assisa panis et cerevisciæ in eadem cepit, in predjudicium nostrum non modicum et gravamen, ut dicitur. Et habeas ibi summonitores et hoc breve. Teste etc.

LA VIEUX NATURA BREVIUM (Tottell 1584) 160 b.

## XV

### MANDAMUS

*A. Old Form.*

Carolus II. Dei gratia etc. C. L. Majori Burgi de E. in comitatu G. salutem. Cum A. in locum et officium Majoris Burgi prædicti debite electus fuerit, secundum consuetudinem villæ prædictæ hactenus usitatam,

in quod quidam locum et officium Majoris Burgi prædicti prædictus A., secundum consuetudinem villæ prædictæ, admitti debet; Tu tamen C. L. Major Burgi pærdicti præmissa non ignarus, prædictum A. in locum et officium Majoris Burgi prædicti non ad huc admisisti, nec juramentum eidem A. in eo casu semper usitatum administrari non administrasti, sed prædictum A. admittere et jurare omnino recusasti, in ipsius A. damnum non modicum, et gravamen et status sui lesionem manifestam, sicut ex querela sua accepimus; Nos igitur præfato A. debitam et festinam justiciam in hac parte fieri volentes, ut est justum, tibi Mandamus firmiter injungentes quod, immediate post receptionem hujus brevis, præfatum A. in locum et officium Majoris Burgi prædicti, in quo sic ut prefertur debite electus fuit, cum omnibus libertatibus privilegiis preheminenciis et commoditatibus ad locum et officium illius pertinentibus et spectantibus sine dilatione admittas, et juramentum eidem A. secundum consuetudinem in eo casu hactenus usitatam, administras seu administrari facias, vel causam nobis significes in contrarium, ne tuo defectu querela ad nos perveniat; Et qualiter hoc preceptum nostrum fueris executorem nobis constari facias in Octabas Sancti Hillarii ubicunque tunc fuerimus in Anglia, hoc breve nostrum tunc remittens. Teste etc.

THESAURUS BREVIUM (Ed. 1687) 159.

*B. Modern Form.*

Edward VII. by the grace of God etc. To , of , greeting. Whereas by [*here recite Act of Parliament or Charter if the act required to be done is founded on one or the other*]. And whereas we have been given to understand and be informed in the King's Bench Division of our High Court of Justice before us that [*insert necessary inducement and averments*]. And that you the said were then and there required by [*insert demand*] but that you the said well knowing the premises, but not regarding your duty in that behalf, then and there wholly neglected and refused to [*insert refusal*] nor have you or any of you at any time since , in contempt of Us and to the great damage and grievance of , as we have been informed, from their complaint made to Us. Whereupon we being willing that due and speedy justice should be done in the premises as it is reasonable, do command you the said and every of you, firmly enjoining you, that you [*insert command*], or that you show us cause to the contrary thereof, lest by your default the same complaint should be repeated to Us, and how you shall have executed this Our Writ make known to Us in Our said Court forthwith, then returning to Us this Our said writ, and this you are not to omit.

Witness [ ] the day of in the year of our reign.

By the Court.
(Signed.)

## XVI

### HABEAS CORPUS AD SUBJICIENDUM

*A. Old Form.*

Carolus Dei gratia etc. Johanni Lilœ militi Guardiano prisonæ nostræ de le Fleet salutem. Præcipimus tibi quod corpus Walteri Earl militis in prisona nostra sub custodia tua detentum, ut dicitur, una cum causa detentionis suæ, quocunque nomine prædictus Walterus censeatur in eadem, Habeas Corpus ad subjiciendum et recipiendum ea quæ curia

nostra de eo ad tunc et ibidem ordinare contingant in hac parte, et hæc nullatenus omittas periculo incumbendo ; et habeas ibi hoc breve. Teste Hyde apud Westmonasterium quarto die Nov. anno 8.

*B. Modern Form.*

Victoria by the grace of God etc. To J. K. Keeper of our gaol of Jersey, in the Island of Jersey, and to J. C. Viscount of the said Island, greeting. We command you that you have the body of C. C. W. detained in our prison under your custody, as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called or known, in our Court before us at Westminster, on the 18th day of January next, to undergo and receive all and singular such matters and things which our said Court shall then and there consider of him in this behalf; and have there then this writ. Witness Thomas Lord Denman at Westminster, the 23rd day of December in the 8th year of our reign.

By the Court.

ROBINSON.

## XVII

*A.* The Writ of *Quibusdam certis de causis.*

Rex, Ricardo Capellano uxoris Johannis de Grymmestede chivalier, salutem. Quibusdam certis de causis coram consilio nostro propositis, tibi præcipimus firmiter injungentes, quod omnibus aliis prætermissis, sis in propria persona tua coram dicto consilio nostro in cancellaria nostra, die Mercurii proxima post festum Epiphaniæ Domini proximo futurum, ad respondendum ibidem super hiis quæ tunc tibi objicientur ex parte nostra, et ad faciendum ulterius et recipiendum quod curia nostra consideraverit in hac parte. Et habeas ibi hoc breve. Teste custode etc apud Eltham xxvi die Decembris. Per consilium.

(PALGRAVE COUNCIL 132.)

*B.* The Writ of *Subpœna.*

Edwardus etc. dilecto sibi Ricardo Spynk des Norwyco, salutem. Quibusdam certis de causis, tibi præcipimus firmiter injungentes, quod sis coram consilio nostro apud Westmonasterium, die Mercurii proximo post quindenam nativitatis Sancti Johannis Baptistæ proximo futurum : ad respondendum super hiis quæ tibi objicientur ex parte nostra, et ad faciendum et recipiendum quod curia nostra consideraverit in hac parte. *Et hoc subpœna centum librarum nullatenus omittas.* Teste meipso apud Westmonasterium, tercio die Julii, anno regni nostri tricesimo septimo. (PALGRAVE COUNCIL 41.)

## XVIII

### WRIT DE EXCOMMUNICATO CAPIENDO

Rex vicecomiti Lincolnensi salutem. Significavit nobis venerabilis pater Henricus Lincolniæ episcopus per literas suas patentes, quod B. suus parochianus vel suæ diocesæ, propter suam manifestam contumaciam auctoritate ipsius episcopi ordinaria excommunicatus est, nec se vult per censuram ecclesiasticam justitiari. Quia vero potestas regia sacrosanctæ ecclesiæ in querelis suis deesse non debet : tibi præcipimus quod prædictum B. per corpus suum secundum consuetudinem Angliæ justities, donec sanctæ ecclesiæ, tam de contemptu quam de injuria ei illata ab eo fuerit satisfactum. Teste etc.

## XIX

### The Quo Warranto Enquiries

*A.* The Commission to enquire and Articles of enquiry.

*The Commission.*

Rex dilectis et fidelibus suis Ricardo de Fukeram et Osberto de Bereford salutem. Sciatis quod assignavimus vos ad inquirendum per sacramentum proborum et legalium hominum de Comitatibus Salop. Stafford et Cestr. per quos rei veritas melius sciri poterit et inquiri, de quibusdam juribus libertatibus, et rebus aliis nos et statum nostrum necnon et statum communitatis Comitatuum prædictorum contingentibus, et insuper de factis et gestibus Vicecomitum et Ballivorum quorumcumque in Comitatibus prædictis, prout in articulis quos vobis inde tradiderimus pleniter continetur. Et ideo vobis mandamus quod ad certos dies et loca quos ad hoc provideritis inquisitiones illas faciatis juxta continentia articulorum prædictorum. Et eas distincte et apte scriptas nobis sub sigillis vestris et sigillis eorum per quos factæ fuerint sine dilatione mittates. Mandavimus enim Vicecomitibus nostris Comitatuum prædictorum quod ad certos dies et loca quos eis scire faciatis tot et tales probos et legales homines de ballivis suis coram vobis venire facient per quos rei veritas in præmissis melius sciri poterit et inquiri. In cujus rei testamonium etc. Teste etc.

Similar commissions were issued appointing two commissioners for each of the following groups of counties :—

(1) Kent, Surrey, Sussex, Middlesex and the City of London.
(2) Wilts, Southampton, Berkshire and Oxfordshire.
(3) Somerset, Dorset, Devon and Cornwall.
(4) Northampton, Rutland and Lincoln.
(5) York.

*The Articles of Enquiry.*

(1) Quot et quæ dominica maneria Rex habet in manu sua in singulis Comitatibus tam scilicet de antiquis dominicis Coronæ quam de esceactis et perquisitis.

(2) Quæ etiam maneria esse solent in manibus Regum predecessorum Regis, et qui ea tenent nunc, et quo waranto, et a quo tempore, et per quam, et quomodo fuerint alienata.

(3) De fœdis etiam domini Regis et tenentibus ejus qui ea modo teneant de ipso in capite, et quot fœda singuli ipsorum teneant, et quæ fœda teneri solent de Rege in capite et nunc tenentur per medium, et per quem medium, et a quo tempore alienata fuerint, et qualiter, et per quos.

(4) De terris etiam tenentium de antiquo dominico coronæ tam liberorum sokemannorum quam bondorum, utrum per ballivos aut per eosdem tenentes, et per quos ballivos, et per quos tenentes, et a quibus alienatæ fuerint, qualiter, et quo tempore.

(5) Simili modo inquiratur de firmis Hundredorum, Wappentake, et Trythyng, Civitatum, Burgorum, et aliorum reddituum quorumcunque, et a quo tempore.

(6) Quot etiam Hundreda, Wappentake, et Trythynga sint nunc in manum domini Regis, et quot, et quæ in manibus aliorum, et a quo tempore, et quo waranto, et quantum valeat quod libet Hundredum per annum.

(7) De sectis antiquis, consuetudinibus, serviciis, et aliis rebus domino

Regi et antecessoribus suis subtractis, qui ea subtraxerint, et a quo tempore, et qui hujusmodi sectis (sc secta) consuetudines servicia et alia ad dominum Regem pertinentia et consueta sibi ipsis appropriaverint, et a quo tempore, et quo waranto.

(8) Qui etiam alii a Rege clamant habere retornam vel extractas brevium, et qui tenent placita de vetito namii, et qui clamant habere Wreccum maris, quo waranto et alias libertates regias, ut furcas, assisas panis et cerevisiæ, et alia quæ ad coronam pertinent, et a quo tempore.

(9) De hiis etiam qui habent libertates per Reges Angliæ sibi concessas, et eas aliter usi fuerint quam facere debuissent, qualiter, a quo tempore, et quo modo.

(10) Item de libertatibus concessis quæ impediunt communem justitiam et regiam potestatem subvertunt, et a quo concessæ fuerint, et a quo tempore.

(11) Qui insuper de novo appropriaverint sibi chacias liberas vel warennas sine waranto, et similiter qui ab antiquo hujusmodi chacias et warennas ex concessione Regia habuerint, et fines et metas earum excesserint, et a quo tempore.

(12) Qui etiam domini aut eorum senescalli seu ballivi quicunque seu etiam domini Regis ministri non sustinuerint executionem mandatorum domini Regis fieri, aut etiam facere contempserint, vel aliquo modo ea fieri impedierint, a tempore constitutionum factarum apud Marleberne anno regni domini Regis Henrici patrias Regis nunc Quinquagesimo secundo.

(13) Item de omnibus purpresturis quibuscunque factis super Rege vel regale dignitate, per quos factæ fuerint, qualiter, et a quo tempore.

(14) De fœdis militaribus cujuscunque fœdi, et terris aut tenementis datis vel venditis religiosis, vel aliis in prejudicium Regis, et per quos, et a quo tempore.

(15) De Vicecomitibus capientibus munera ut consentiant ad concelandas felonias factas in ballivis suis, vel qui negligentes extiterint ad felones hujusmodi attachiandos quocunque favore tam infra libertates quam extra, simili modo de clericis et aliis ballivis vicecomitum, de coronatoribus et eorum clericis et ballivis quibuscunque qui ita fecerint tempore domini Henrici Regis post bellum de Evesham, et qui tempore domini Regis nunc.

(16) De Vicecomitibus et Ballivis quibuscunque capientibus munera pro recognitoribus removendis de assisis et juratis, et quo tempore.

(17) Item de Vicecomitibus et aliis Ballivis quibuscunque qui amerciaverint illos qui summoniti fuerint ad inquisitiones factas per preceptum domini Regis pro defalta cum per eandem summonitionem personæ venierint sufficientes ad inquisitiones hujusmodi faciendas, et quantum, et a quibus ceperint occasione prædicta, et quo tempore.

(18 Item de Vicecomitibus qui tradiderint Ballivis extorsoribus, populum gravantibus supra modum, Hundreda, Wapentaka, vel Trithingga ad altas fermas ut sic suas fermas levarent, et qui fuerint illi Ballivi, et quibus fuerint hujusmodi damna illata, et quo tempore.

(19) Item cum Vicecomites non debeant facere turnum suum nisi bis in anno qui pluries fecerint in anno turnum suum, et a quo tempore.

(20) Item cum fines pro redisseisinis aut prepresturis factis per terram vel aquam, pro occultatione thesauri et aliis hujusmodi ad dominum Regem pertineant, et ad Vicecomites hujusmodi attachiare, qui ceperint hujusmodi, et a quibus, et quantum.

(21) Item qui potestate officii sui aliquos malitiose occasionaverint et per hoc extorserint terras, redditus, ante alias prestationes, et a quo tempore.

(22) Qui receperint mandatum domini Regis ut ejus debita solverent, et a creditoribus receperint aliquam portionem ut eis residuum solverent, et nichilominus totum sibi allocari fecerint in Scaccario vel alibi, et a quo tempore.

(23) Qui receperint debita Regis vel partem debitorum, et debitores illos non acquietaverint, tam tempore domini Regis Henrici quam tempore domini Regis nunc.

(24) Item qui summonierint aliquo ut fierent milites, et pro respectu habendo ab eis lucra receperint, et quantum et quo tempore: Et si aliqui magnates vel alii sine precepto Regis aliquos distrinxerint ad arma suscipienda, et quo tempore.

(25) Item si Vicecomites aut Ballivi aliqui cujuscunque libertatis non fecerint summonitiones debito modo secundum formam brevis domini Regis, ut aliter fraudulenter seu minus sufficienter executi fuerint precepta regia prece pretio vel favore, et quo tempore.

(26) Item de hiis qui habuerint probatores imprisonatos, et fecerint eos appellare fideles et innocentes causa lucri, et quandoque eos impedierint ne culpabiles appellarent, et a quo tempore.

(27) Item qui habuerint felones imprisonatos et eo pro pecunia abire et a prisona evadere promiserint liberos et impune, et qui pecuniam extorserint pro prisona dimittenda per plevinam cum sint repleggiati, et a quo tempore.

(28) Item qui dona vel lucra aliqua receperint pro officiis suis exercendis vel non exercendis, vel exequendis vel aliter executi fuerint seu excesserint fines mandati Regis, aliter quam ad officium suum pertinuit, et quo tempore.

(29) Et omnia ista inquirantur tam de Vicecomitibus Coronatoribus eorum clericis et ballivis quibuscunque quam de dominis et ballivis libertatum quarumcunque.

(30) Item qui Vicecomites vel custodes castrorum vel maneriorum domini Regis quorumcunque, vel etiam qui visores hujusmodi operationum ubicunque factarum per preceptum Regis, magis computaverint in eisdem quam rationabiliter apposuerint, et super hoc soldatas allocari sibi fieri procuraverint. Et similiter qui petram, mæremium (i.e. materiam), vel alia ad hæc operationes empta seu provisa, ad opus suum retinuerint, seu amoverint, et quod, et quantum damnum dominus Rex inde habuit, et quo tempore.

(31) De Esceactoribus et Subesceactoribus, in seisina domini Regis, facientibus vastum vel destructionem in boscis piscariis vivariis warennis infra custodias sibi commissas per dominum Regem, quare, si, et de quibus, et quo modo, et quo tempore.

(32) Item de eisdem si occasione hujusmodi seisinæ ceperunt bona defunctorum vel heredum in manum domini Regis injuste, donec redimentur ab eisdem, et quod, et quantum ita ceperint pro hujusmodi redemptione, et quid ad opus suum proprium inde retinuerint, et quo tempore.

(33) Item de eisdem qui ceperint munera a quibuscunque pro officio suo exequendo vel non exequendo, quantum, et a quibus, et quo tempore.

(34) Item de eisdem qui nimis sufficienter extenderint terras alicujus in favorem ejusdem, vel alterius in custodia illarum terrarum, dari vendi vel concedi debuerat, in deceptionem domini Regis, et ubi, et quomodo, et si, qui pro inde ceperint, et quantum, et quo tempore. HUNDRED ROLLS (Rec. Comm.) I 13, 14.

*B.* Rotuli Hundredorum.

Veredictum Burgi de Tavistock,

Factum per sacramentum (of twelve jurors whose names follow).

Qui dicunt quod locus ubi villata de Tavistock nunc sita est, et abbatia, aliquando fuit Adelredi Regis Angliæ ante conquestum, qui illum dedit Ordulpho comiti fratri suo, et idem Ordulphus de licentia prædicti Regis ibidem fieri fecit abbatiam, quæ nunc est, in puram et perpetuam eleemosinam, et quidam abbas ejusdem loci prædictam villam fecit levari, quæ nunc valet per annum octo libras, quam idem abbas nunc de domino Rege tenet in capite per baroniam, simul cum aliis terris pertinentibus ad baroniam, per quindecim fœda militum et dimidiam.

Item idem abbas habet assisam panis et cervisiæ, pilloriam et tomborellum in prædicto burgo, a tempore quod non extat memoria, et habet mercatum in eodem burgo et nundinas semel in anno; sed nesciunt quo warranto . . . I. 80 no. 25.

Veredictum duodecim juratorum forinseci Hundredi de Tavistock, scilicet,

(Here follow the names of the twelve jurors.)

Qui dicunt quod locum de Tavistock cum forinseco hundredo ibidem, aliquando fuit domini Adelredi tunc Regis Angliæ ante conquestum, ut intelligunt, et idem Adelredus dedit eundem locum cum forinseco hundredo Ordulpho comiti fratri suo, qui ex licencia fratris sui quandam Abbatiam nigrorum monachorum Sancti Bendicti, in pura et perpetua eleemosina, pro animabus predecessorum suorum et successorum Regum Angliæ, et tenent abbas ejusdem loci et conventum quindecim fœda et dimidiam ense de Hauglebergh (?) de domino Rege in capite, et habent in manerio de Hurdewick ejusdem hundredi furcas a tempore quod non extat memoria, ignorant tamen per quod servicium dicti religiosi fœda teneant et quantum valent per annum, proficium tamen dicti hundredi valet unam marcam per annum, et de redditu assisæ per annum novem libras, ut intelligant.

Item dicunt quod Roger de Prideaus, aliquando Vicecomes Devoniæ, per Robertum Pollard, tunc clericum suum, et Johanem Collan et ceteros forestarios de Dertamor, injuste intravit in liberum manerium de Hurdewick dictorum religiosorum, qui ibidem ostia fregerunt et fugabant ad Lideford comitis Cornubiæ quadraginta averia, et ibidem detinuerunt donec iidem religiosi quinque marcas eidem vicecomiti dederant.

Item dicunt quod Ricardus de Seton, tunc senescallus Cornubiæ, per potestam officii injuste intravit in prædictam abbatiam, volens Robertum abbatem loci ejusdem ejicere, et extorsit ab eodem centum solidos ut ipsum dimitteret.

Item dicunt quod Johannes de Wykiæ et Robertus Chapman, tunc ballivi Johannis Beaupre senescalli Cornubiæ, eo tempore injuste per potestatem officii sui, ceperunt in burgo de Tavistock dictorum religiosorum Johannem vicarium de Middleton, et eum duxerunt de dicta

villa ad castellum de Lansacon in Cornubia, ipsum ibidem imprisonantes, et antequam eum dimiserunt extorserunt ab eo quatuor marcas.

Item dicunt quod iidem Johannes et Robertus eodem modo ceperunt Johannem de Kerdewille, et ipsum apud Lam'ton imprisonaverunt, et ita extorserunt ab eo quatuor solidos antequam eum dimittebant.

Item dicunt quod comes Cornubiæ, per Wilecoccum Rossel et Petrum Whiffing ballivos suos, apud Esse novam levaverunt consuetudinem; capiunt enim de singulis bargis et batellis cum sablone, in aquam de Tamar transeuntibus, duodecim denarios ubi nihil solitum est exigi.

I 80 no. 36.

*C.* Placita de Quo Warranto 170 (Com. Devon. Ed. I.).

Abbas de Tavistock summonitus fuit ad respondendum domino Regi quo warranto tenet hundredum de Tavistock, quod pertinet ad Coronam domini Regis, et quo warranto clamat habere visum franci pledgii, furcas, tumberellum, pilloriam, et emendationem assisæ panis et cerevisciæ fractæ, mercatum, nundinas, in Tavistock, sine licencia domini Regis vel predecessorum suorum Regum Angliæ.

Et Abbas venit, et quo ad hundredum dicit quod hundredum illud est annexum baroniæ suæ quam tenet de domino Rege et de pertinenciis ejusdem baroniæ. Et eo waranto illud tenet.

Et Willelmus de Gyselham, qui sequitur pro domino Rege, dicit quod hundredum est quoddam speciale annexum Coronæ et dignitati domini Regis, quod nullus habere potest nisi ex speciali dono domini Regis, et petit judicium desicut prædictus Abbas nullum speciale warantum ostendit. Dies datus est coram domino Rege a die Paschæ in unum mensam ubicumque etc. de audiendo judicio suo etc.

Et quo ad visum francipledgii, furcas, tumberellum, pilloriam, et emendationem assisæ panis et cerevisciæ, dicit quod hujusmodi libertates pertinent ad hundredum, et desicut ipsemet tenet prædictum hundredum petit judicium. Dies data est ei de audiendo judicio suo ut supra. Et quo ad mercatum et nundinas dicit quod ipse et omnes predecessores sui, Abbates ejusdem loci, habuerunt prædictum mercatum et nundinas in manerio de Tavistock, a tempore quo non extat memoria. Et hoc petit quod inquiratur per patriam. Et Willelmus de Gyselham similiter. Ideo inquiritur. Et juratores dicunt supra sacramentum suum quod prædictus Abbas, et omnes predecessores sui, a quo non extat memoria, semper usi sunt prædictis mercato et nundinis apud Tavistock. Dies datus est a die Paschæ in unum mensam coram domino Rege ubicumque etc. de audiendo judicio etc.

## XX

### The Bill of Middlesex and Latitat

*Middlesex, to Wit.*[1]

The Sheriff is commanded that he take Charles Long, late of Burford in the county of Oxford, if he may be found in his bailiwick, and him safely keep, so that he may have his body before the lord the king at Westminster, on Wednesday next after fifteen days of Easter, to answer William Burton, gentleman, of a plea of trespass; *and also* to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt,[2] according to the custom of the court of the said lord the king,

[1] Bill of Middlesex for trespass.

[2] *Ac etiam* in debt.

before the king himself to be exhibited; and that he have there then this precept.

The within named Charles Long is not found in my bailiwick.[1]

George II.[2] by the grace of God etc. to the sheriff of Berkshire greeting. Whereas we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford in the county of Oxford, if he might be found in his bailiwick and him safely keep, so that he might be before us at Westminster at a certain day now past, to answer unto William Burton gentleman of a plea of trespass; *and also* to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court, before us to be exhibited; and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; whereupon on the behalf of the aforesaid William in our court before us it is sufficiently attested, that the aforesaid Charles lurks and runs about (*latitat et discurrit*) in your county: therefore we command you that you take him, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster on Tuesday next after five weeks of Easter, to answer to the aforesaid William of the plea and bill aforesaid: and have you there then this writ. Witness sir Dudley Ryder knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign.

By virtue of this writ[3] to me directed I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

BL. COMM. III App. no. 3 § 4.

## XXI

### WRIT OF QUOMINUS IN THE EXCHEQUER

George II. by the grace of God etc. to the sheriff of Berkshire greeting. We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford in the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the barons of our exchequer at Westminster, on the morrow of the holy Trinity, to answer William Burton our debtor of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, whereby he is less able (*quo minus*) to satisfy us the debts which he owes us at our said exchequer, as he saith he can reasonably shew that the same he ought to render: and have you there this writ. Witness sir Thomas Parker knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

BL. COMM. III App. no. 3 § 4.

## XXII

### THE EYRE

*A. Breve omnibus justitiariis simul, quod erit eorum warrantus, et publice legetur in comitatu patens.*

Rex dilectis et fidelibus suis A. B. C. D. salutem. Sciatis quod

[1] Sheriff's return, *non est inventus*.

[2] *Latitat*.

[3] Sheriff's return, *Cepi corpus*.

constituimus vos justitiarios nostros ad itinerandum in comitatu tali, de omnibus placitis et assisis tam coronæ nostræ quam aliis, quæ emerserint, postquam justitiarii nostri ultimo itineraverunt in comitatu illo, et etiam de illis, quæ summonita fuerunt et atterminata fuerunt, et non finita coram justitiariis nostris de banco apud Westmonasterium, vel coram justitiariis nostris itinerantibus qui ultimo itineraverunt in eodem comitatu, de omnibus placitis, vel tantum de assisis novæ disseysinæ, mortis antecessoris capiendis, vel gaolis deliberandis, ita quod omnes assisæ illæ et omnia placita illa sint coram vobis in eodem statu quo remanserunt per preceptum nostrum, vel per præfatos justitiarios nostros itinerantes, vel per præfatos justitiarios nostros de banco. Mandavimus enim vicecomiti nostro A. quod ad diem et locum quam ei scire facietis, faciet coram vobis summonitiones fieri, et attachiamenta venire, cum brevibus assisarum et placitorum prædictorum. Et ideo vobis mandamus, rogantes quod in fide, qua nobis tenemini, ad hæc exequenda fideliter et diligenter intendatis, ut tam fidem vestram quam diligentiam ad hoc appositam debeamus merito commendare. Teste etc.

BRACTON, f. 109.

*B. Breve de generali summonitione clausum.*

Rex vicecomiti salutem. Summoneas per bonos summonitores omnes archiepiscopos, episcopos, abbates, priores, comites, barones, milites et libere tenentes de tota balliva tua, et de qualibet villa quatuor legales homines et præpositum et de quolibet burgo duodecem legales burgenses per totam ballivam tuam, et omnes illos qui coram justitiariis itinerantibus venire solent et debent, quod sint apud talem locum, tali die, anno regni nostri tali, coram dilectis et fidelibus nostris A. B. C. D. quos justitiarios nostros constituimus, audituri et facturi præceptum nostrum. Facias etiam venire tunc coram eisdem justitiariis nostris omnia placita coronæ nostræ quæ placitata non sunt, et quæ emerserunt, post quam justitiarii nostri ultimo itineraverunt in partibus illis, et omnia placita, et omnia attachiamenta ad placita illa pertinentia, et omnes assisas, et omnia placita quæ posita fuerunt ad primum assisam coram justitiariis cum brevibus assisarum, ita quod assisæ illæ et placita pro defectu tui vel summonitionis tuæ non remaneant. Facias etiam clamari et sciri per totam ballivam tuam quod omnes assisæ et omnia placita quæ fuerunt attachiata et atterminata et non finita coram justitiariis nostris de banco, vel coram justitiariis nostris qui ultimo itineraverunt in comitatu tuo de omnibus placitis, vel coram justitiariis nostris illuc missis ad assisas novæ disseysinæ capiendas, et gaolas deliberandas, tunc sint coram præfatis justitiariis nostris, apud talem locum, in eodem statu in quo remanserunt per præceptum nostrum vel per præceptum justitiariorum nostrorum prædictorum itinerantium, vel per justitiarios nostros de banco. Summoneas etiam per bonos summonitores, omnes illos qui vicecomites fuerunt post ultimam itinerationem prædictorum justitiariorum nostrorum in partibus illis, quod tunc sint ibidem coram prædictis justitiariis nostris itinerantibus cum brevibus assisarum et placitorum, quæ tempore suo receperunt, et ad respondendum de tempore suo, sicut respondere debent coram justitiariis itinerantibus, et habeas ibi summonitores et hoc breve. Teste etc. BRACTON, f. 109 b.

*C. Writ of resummons at the close of the eyre.*

Rex vicecomiti salutem. Præcipimus tibi quod sine dilatione clamare facias in comitatu tuo et per comitatum tuum in diversis hundredis, et

mercatis, et per omnes partes de comitatu tuo, quod omnia placita quæ per brevia nostra vel per præceptum justitiariorum nostrorum de banco atterminata fuerunt apud Westmonasterium infra octabas S. Hilarii ultimo præteritas et Paschæ proxime sequentes, et quæ per præceptum nostrum posita fuerunt sine die occasione itinerationis talis, sint coram justitiariis nostris de banco apud Westmonasterium ad talem terminum in eodem statu in quo fuerunt quando remanserunt sine die per præceptum nostrum occasione prædicta, tam de essoniis faciendis et non faciendis, quam de omnibus aliis circumstantiis eorundem placitorum. Alia vero placita, quæ per præceptum nostrum vel per præceptum prædictorum justitiariorum nostrorum itinerantium posita fuerunt post certum diem ad talem terminum, apud talem locum, ad talem terminum et talem, ibi deducantur et teneantur, sicut ibi posita fuerunt, et habeas ibi hoc breve, et alia brevia omnia quæ penes te habes pertinentia ad prædicta placita. Teste etc. BRACTON f. 426.

## XXIII

### COMMISSIONS OF THE JUSTICES OF ASSIZE

*A. Assize.*

Rex etc. dilectis et fidelibus suis R. M. uni Justiciorum suorum de Banco, et J. L. uni Justiciorum suorum ad placita coram nobis tenenda assignato Salutem. Sciatis quod constituimus vos Justitiarios nostros, una cum hiis quos vobis associaverimus, ad omnes assisas, jurata, certificationes coram quibuscunque Justitiis tam per diversa brevia domini Johannis nuper regis Angliæ patris nostri, quam per diversa brevia nostra in Comitatibus nostris South., Wiltes., Dors., Somerset, Devon, et Cornub, ac in civitate Exon. arreniatas capiendas. Et ideo vobis mandamus, quod ad certos dies et loca quos vos ad hoc provideritis, Assisas, Jurata, et certificationes illas capiatis; Facturi inde quod ad justitiam pertinet secundum legem et consuetudinem regni nostri Angliæ. Salvis nobis amerciamentis inde provenientibus. Mandavimus enim Vicecomitibus nostris comitatuum et civitatum prædictorum, quod ad certos dies et loca quos eis scire faciatis assisas, jurata, et certificationes illas una cum brevibus originalibus et omnibus alias ea tangentibus coram vobis venire faciant. In cujus rei testimonium etc.

COKE, 4th Institute 158.

*B. Nisi Prius.*

Rex vicecomiti salutem. Præcipimus tibi quod venire facias coram Justitiariis nostris apud Westmonasterium in Octabas Sancti Michælis, vel coram Justitiariis nostris ad Assisas in comitatu tuo, per formam Statuti nostri inde provisam, capiendas assignatis, *si prius* die lunæ proximo ante festum etc. Apud etc. venierint, duodecim tam milites quam alios etc.

STAT. WEST II (13 Ed. I. St. 1) c. 30. COKE 4th Institute 159.

*C. Oyer and Terminer.*

Elizabeth Dei gratia etc. Carissimis consanguineis suis Willielmo Marchioni Winton, Henrico Comiti South etc. ac dilectis et fidelibus suis Rogero Manwood, uni Justitiorum suorum de Banco, Johanni Jeffray, uni Justitiorum ad placita coram nobis temenda assignato, Johanni Arundell militi etc. Johanni St John, Humfredo Walrond, Willielmo Pool, Petro Edgcombe, Thomæ Morton etc. Salutem.

Sciatis assignavimus vos et tres vestrum, quorum aliquem vestrum vos prefatos Rogerum Manwood et Johannem Jeffray unum esse volumus, Justitiarios nostros ad inquirendum per sacramentum proborum et legalium hominum de comitatibus nostris South., Wiltes., Doreset, Somerset, Devon, et Cornub. et eorum quolibet, ac aliis viis, modis, et mediis quibus melius sciveritis, aut poteritis, tam infra libertates quam extra, per quos rei veritatem melius sciri poterit, de quibuscunque proditionibus, misprisionibus proditionum, insurrectionibus, rebellionibus, murdris, feloniis, homicidiis, interfectionibus, burglariis, raptibus mulierum, congregationibus, et conventiculis illicitis, verborum prolationibus, coadjutationibus, misprisionibus, confæderationibus, falsis allegantiis, transgressionibus, riotis, routis, retentionibus, escapiis, contemptibus, falsitatibus, negligentiis, concelamentis, manutenentiis, oppressionibus, cambipartiis, deceptionibus, et aliis malefactis, offensis, et injuriis, quibuscunque, nec non accessariis eorundem infra comitatum prædictum et eorum quamlibet, tam infra libertates quam extra, per quoscunque et qualitercunque habita, facta, perpetrata, sive commissa. Et per quos, vel per quam, cui, vel quibus, quando, qualiter, et quo modo, ac de aliis articulis et circumstantiis præmissis, et eorum aliquid vel aliqua qualitercunque concernentia. Et ad easdem proditiones, et alia præmissa (hac vice) audienda et terminanda secundum legem et consuetudinem regni nostri Angliæ. Et ideo vobis mandamus quod ad certos dies et loca quos vos vel tres vestrum, quorum aliquem vestrum ex vobis præfatos Rogerum Manwood et Johannem Jeffray unum esse volumus, ad hoc provideritis diligenter, super præmissis faciatis inquisitiones, et præmissa omnia et singula audiatis et terminetis, ac ea faciatis et expleatis in formam prædicta, facturi inde quod ad Justitiam pertinet secundum legem et consuetudinem regni nostri Angliæ. Salvis nobis amerciamentis et aliis ad nos inde spectantibus. Mandavimus enim Vicecomitibus nostris comitatuum prædictorum quod ad certos dies et loca, quos vos vel tres vestrum, quorum aliquem vestrum ex vobis præfatos Rogerum Manwood et Johannem Jeffray unum esse volumus, eis sciri feceritis, venire facere coram vobis, vel tribus vestrum, quorum aliquem vestrum vobis præfatos Rogerum Manwood et Johannem Jeffray unum esse volumus, tot et tales probos et legales homines de ballivis suis, tam infra libertates quam extra, per quos rei veritas melius sciri poterint et inquiriri. In cujus rei testimonium has literas nostras fieri fecimus patentes. Teste me ipse apud Westmonasterium 27 die Junii Anno Regni nostri decimo octavo. COKE 4th Institute 162, 163.

*D. Gaol Delivery.*

Elizabeth etc. Dilectis et fidelibus suis A. B. C. D. etc. Salutem. Sciatis quod constituimus vos, tres, et duos vestrum, quorum aliquem vestrum vos præfatos A. B. etc. unum esse volumus, Justitiarios nostros ad Gaolam nostram castri nostri de C. de prisona in ea existente hac vice deliberandos. Et ideo vobis mandamus quod ad certum diem quam vos, tres vel duo vestrum (quorum vos præfatos A. B. etc. unum esse volumus) ad hoc provideritis, conveniatis apud castrum prædictum ad gaolam illam deliberandam, facturi inde quod ad justitiam pertinet secundum legem et consuetudinem regni nostri Angliæ. Salvis nobis amerciamentis et aliis ad nos inde spectantibus. Mandavimus enim Vicecomiti nostro Comitatus nostri M. quod ad certum diem quam vos, tres, vel duo vestrum (quorum vos præfatos A. B. etc. unum esse volumus) ei sciri feceritis, omnes prisones ejusdem gaolæ, et eorum attachiamenta coram vobis, tribus, vel duobus vestrum (quorum aliquem

vestrum ex vobis præfatos A. B. etc. unum esse volumus) ibidem venire facere. In cujus rei testimonium has literas nostras fieri fecimus patentes. Teste etc. COKE 4th Institute 168.

## XXIV

### COMMISSION OF JUSTICES OF THE PEACE

George II. by the grace of God etc. to A, B, C, D etc. greeting.

Know that we have assigned you, jointly and severally, and every one of you, our justices to keep our peace in our county of W. And to keep and to cause to be kept all ordinances and statutes for the good of the peace, and for preservation of the same, and for the quiet rule and government of our people made, in all and singular their articles in our said county (as well within liberties as without) according to the force, form, and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any one of them, in the aforesaid county, as it ought to be done according to the form of those ordinances and statutes; And to cause to come before you, or any of you, all those who to any one or more of our people concerning their bodies or the firing of their houses have used threats, to find sufficient security for the peace, or their good behaviour, towards us and our people; and if they shall refuse to find such security, then them in our prisons until they shall find such security to cause to be safely kept.

We have also assigned you, and every two or more of you (of whom any one of you [*quorum*] the aforesaid A, B, C, D etc. we will shall be one) our justices to enquire the truth more fully, by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be the better known, of all and all manner of felonies, poisonings, inchantments, soceries, art magick, trespasses, forestallings, regratings, ingrossings, and extortions whatsoever; and of all and singular other crimes and offences, of which the justices of our peace may or ought lawfully to enquire, by whomsoever and after what manner soever in the said county done or perpetrated, or which shall happen to be there done or attempted; And also of all those who in the aforesaid county in companies against our peace, in disturbance of our people, with armed force have gone or rode, or hereafter shall presume to go or ride; And also of all those who have there lain in wait, or hereafter shall presume to lay in wait, to maim or cut or kill our people; And also of all victuallers, and all and singular other persons, who in the abuse of weights or measures, or in selling victuals, against the form of the ordinances and statutes, or any one of them therefore made for the common benefit of England and our people thereof, have offended or attempted, or hereafter shall presume in the said county to offend or attempt; And also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, and other officers, who in the execution of their offices about the premisses, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be careless, remiss, or negligent in our aforesaid county; And of all and singular articles, and circumstances, and all other things whatsoever, that concern the premisses of any of them, by whomsoever, and after what manner soever, in our aforesaid county done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; And to inspect all indictments whatsoever so before

you or any of you taken or to be taken, or before others late our justices of the peace in the aforesaid county made or taken, and not yet determined; and to make and continue processes thereupon, against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted; until they can be taken, surrender themselves, or be outlawed: And to hear and determine all and singular the felonies, poisonings, inchantments, soceries, arts magick, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws and statutes of England, as in the like case it hath been accustomed, or ought to be done; And the same offenders, and every of them for their offences by fines, ransoms, amerciaments, forfeitures, and other means as according to the law and custom of England, or form of the ordinances and statutes aforesaid, it has been accustomed, or ought to be done, to chastise and punish.

Provided always, that if a case of difficulty, upon the determination of any the premisses, before you, or any two or more of you, shall happen to arise; then let judgment in no wise be given thereon, before you, or any two or more of you, unless in the presence of one of our justices of the one or other bench, or of one of our justices appointed to hold the assizes in the aforesaid county.

And therefore we command you and every of you, that to keeping the peace, ordinances, statutes, and all and singular other the premisses, you diligently apply yourselves; and that at certain days and places, which you, or any such two or more of you as is aforesaid shall appoint for these purposes, into the premisses ye make inquiries; and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of England: Saving to us the amercements, and other things to us therefrom belonging.

And we command by the tenor of these presents our sheriff of W. that at certain days and places, which you, or any such two or more of you, as is aforesaid, shall make known to him, he cause to come before you, or such two or more of you as aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the matter in the premisses shall be the better known and inquired into.

Lastly, we have assigned you the aforesaid A. B. keeper of the rolls of our peace in our said county. And therefore you shall cause to be brought before you and your said fellows, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined as is aforesaid.

In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster etc.

BURN, JUSTICE OF THE PEACE (Ed. 1755) II 69-71.

## XXV

## TABLE OF OFFICIALS OF THE COURT OF KING'S BENCH AT DIFFERENT PERIODS

| 1740 and 1815. | | 1874. |
|---|---|---|
| (1) King's Coroner and Attorney | | Queen's Coroner and Attorney |
| (2) Secondary on the Crown Side<br>(3) Clerk of the Rules on the Crown Side<br>(4) Clerk of the Affidavits on the Crown Side<br>(5) Examiner, Calendar Keeper, and Clerk of the Grand Juries. [Held by one person]<br>(6) Clerks in Court in the Crown Office<br>(7) Clerk in Court for the Crown | Abolished 1843 (6, 7 Vict. c. 20) | Master in Crown Office<br>4 Clerks<br>1 Messenger<br>(6, 7 Vict. c. 20) |
| (8) Chief Clerk in the Court of King's Bench<br>(9) Secondary on Plea Side or Master<br>(10) Clerk of the Rules Plea Side<br>(11) Clerk of the Papers<br>(12) Clerk of the Docquets and Judgments<br>(13) Signer of the Writs<br>(14) Clerk of the Declarations<br>(15) Clerk of the Common Bails, Estreats and Posteas<br>(16) Custos Brevium et Recordorum<br>(17) Clerk of the Inner and Upper Treasuries<br>(18) Clerk of the Outer Treasury<br>(19) Clerk of Nisi Prius for London and the Circuits<br>(20) Bag-bearer to Custos Brevium<br>(21) Clerk of Nisi Prius in Middlesex<br>(22) Signer of the Bills of Middlesex<br>(23) Clerk of the Errors<br>(24) Filacer, Exigentor, and Clerk of the Outlawries for all counties but Monmouth and Essex<br>(25) Filacer, etc., for Monmouth and Essex | Abolished 1837 (1 Vict. c. 30) | 5 Masters<br>23 Clerks<br>1 Messenger<br>(1 Vict. c. 30) |
| (26) Receiver-General and Comptroller of the Seal | 6 Geo. IV. c. 89 Authorized Purchase. 8, 9 Vict. c. 34 purchased and abolished | |
| (27) Crier and Usher of the Court.<br>(28) Under Ushers, Criers and Court-keepers | | 4 Ushers<br>Housekeeper |
| (29) Keeper of Westminster Hall | | 3 Clerks allowed (15, 16 Vict. c. 73) |

| | | |
|---|---|---|
| (30) Clerk to the Lord Chief Justice | | 2 Clerks each allowed (15, 16 Vict. c. 73) |
| (31) Clerks to Puisne Judges | | Merged in Associate (15, 16 Vict. c. 73) |
| (32) Associate and Marshal at Nisi Prius in London and Middlesex | | |
| (33) Clerk at the Sittings in London and Middlesex | Abolished 1837 (1 Vict. c. 30) | |
| (34) Crier at the Sittings in London and Middlesex | | |
| (35) Train-bearer to the Lord Chief Justice | | Train-bearer to the Lord Chief Justice |
| (36) Hall-keeper and Bar-keepers in London | | |
| (37) Marshal of the King's Bench Prison | | |
| (38) Clerk of the Papers in the King's Bench Prison | | |
| (39) Deputy Marshal of the King's Bench Prison | | |
| (40) Chaplain of the King's Bench Prison | Abolished 1842 (5 Vict. c. 22) | |
| (41) Clerk of the Day Rules in the King's Bench Prison | | |
| (42) Turnkeys in the King's Bench Prison | | |
| (43) Tipstaves | | 3 Tipstaves<br>Associate, cp. 15, 16 Vict. c. 73<br>3 Clerks<br>Marshals to Judges, cp. 15, 16 Vict. c. 73<br>(Parliamentary Papers xxiv, 1874. 2nd Report of Commission appointed to enquire into the administrative departments of Courts of Justice) |

XXVI

## TABLE OF OFFICIALS OF THE CHANCERY AT DIFFERENT PERIODS

*Lord Chancellor's Officers—*

| 1740 | 1815 | | 1874 |
|---|---|---|---|
| (1) Principal Secretary | The same offices except nos. 9 and 39 | | Principal Secretary<br>2 Clerks<br>Office-keeper |
| (2) Secretary of Presentations | | | Secretary of Presentations |
| (3) Clerk of the Presentations | | Abolished 2, 3 Will. IV. c. 111, work done by Secretary of Presentations and Principal Secretary | |
| (4) Secretary of Commissions | | | Secretary of Commissions |
| (5) Secretary of Decrees and Injunctions | | Abolished 15, 16 Vict. c. 87 | |
| (6) Secretary of Lunatics | | | Registrar in Lunacy<br>4 Clerks<br>15, 16 Vict. c. 87<br>16, 17 Vict. c. 70<br>25, 26 Vict. c. 86 |
| (7) Secretary of the Briefs | | | |
| (8) Clerk of the Briefs | | | |
| (9) Secretary of Appeals | Not extant | | |
| (10) Clerk of the Appeals | | | |
| (11) Clerks of the Letters Patent | | Abolished 2, 3 Will. IV. c. 111 | Clerk of the Patents (3, 4 Will. IV. c. 84) |
| (12) Examiner of Letters Patent | | | |
| (13) Clerk of the Dispensations and Faculties<br>(14) Clerk of the Crown | | Abolished 2, 3 Will. IV. c. 111 | Clerk of the Crown<br>3 Clerks<br>1 Messenger<br>3, 4 Will. IV. c. 84 |
| (15) Purse-bearer | | | Purse-bearer (does duty as Chaff-Wax and Sealer) |
| (16) Chaff-Wax<br>(17) Sealer | | Abolished 15, 16 Vict. c. 87 | |
| (18) Gentlemen of the Chamber | | One abolished 15, 16 Vict. c. 87 | Gentleman of the Chamber |
| (19) Serjeant-at-Arms | | | Serjeant-at-Arms |
| (20) Pursuivant to the Great Seal | | | Train-bearer<br>Messenger to Great Seal |
| (21) Usher of the Hall at the Lord Chancellor's | | | Usher of the Hall at Lincoln's Inn<br>Messenger during absence from Town |
| (22) Usher of the Court<br>(23) Crier of the Court | | Abolished 15, 16 Vict. c. 87 | Attendant on Furnaces, Lincoln's Inn |

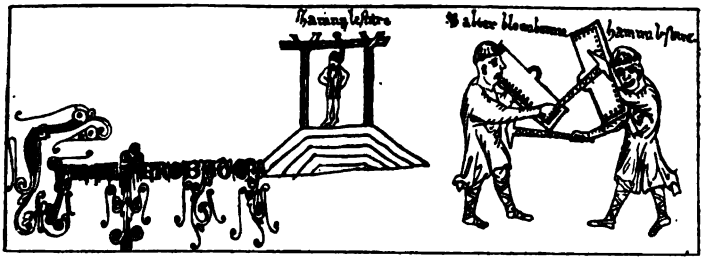
| | | | |
|---|---|---|---|
| (24) Tipstaff, being deputy of Warden of the Fleet | | | Tipstaff |
| (25) Doorkeeper of the Court | | Abolished 15, 16 Vict. c. 87 | Caretaker of Courts Lincoln's Inn |
| (26) Keeper of the Court | | | Porter to the Great Seal<br>Keeper of Court at Westminster<br>3 Persons to keep order in Court |
| *Master of the Rolls Officers—* | | | |
| (27) Chief Secretary | | | Secretary<br>2 Clerks<br>1 Office Cleaner |
| (28) Under Secretary | | | |
| (29) Secretary of Causes | | | Secretary of Causes |
| (30) Secretary of Decrees and Injunctions | | | |
| (31) Clerk of the Chapel | | | Preacher at the Rolls Chapel |
| (32) Gentlemen of the Chamber (2) | | | 2 Gentlemen of the Chamber |
| (33) Usher of the Hall at the Rolls | | | Usher of the Court |
| (34) Tipstaff | | | Tipstaff<br>2 Court Cleaners |
| (35) Keeper of the Records in the Tower | | | |
| (36) Porter at the Rolls | | | Porter to the Court |
| (37) Masters in Chancery Extraordinary | | Abolished 16, 17 Vict. c. 78 | Commissioners to administer oath 16, 17 Vict. c. 78 |
| (38) Clerk of the Custodies of Idiots and Lunatics | | Abolished 2, 3 Will. IV. c. 111; 5, 6 Vict. c. 84 | |
| (39) Clerk of the Leases | Not extant | | |
| (40) Masters in Chancery | | Abolished 15, 16 Vict. c. 80 | Chief Clerks :—<br>3 at the Rolls<br>9 at the Vice-Chancellors<br>46 Clerks<br>4 Porters<br>4 Caretakers of Courts<br>(15, 16 Vict. c. 80; 23, 24 Vict. c. 149; 30, 31 Vict. c. 87) |
| (41) Accountant General | | | Assistant Paymaster General for Chancery<br>43 Clerks<br>1 Office Cleaner<br>(35, 36 Vict. c. 44) |
| (42) Register and Deputy Registers | | | Registrars (12)<br>15 Clerks<br>12 Assistant Clerks<br>(3, 4 Will. IV. c. 94; 5 Vict. c. 5) |

| | | |
|---|---|---|
| (43) Clerks of Entries | | 2 Clerks of Entries; 2 Bag-bearers; 4 Office Cleaners. (14, 15 Vict. c. 83; 30, 31 Vict. c. 87) |
| (44) Register of Affidavits | Duties given to Clerks of Records and Writs (15, 16 Vict. c. 87) | |
| (45) Examiner's Office | | 2 Examiners<br>2 Clerks<br>1 Office Cleaner<br>(16 Vict. c. 22) |
| (46) Six Clerks' Officer | Abolished 5, 6 Vict. c. 103 | 7 Taxing Masters<br>14 Clerks<br>1 Office-keeper<br>(5, 6 Vict. c. 103) |
| (47) Sworn Clerks | Abolished 5, 6 Vict. c. 103 | |
| (48) Waiting Clerks | Abolished 5, 6 Vict. c. 103 | |
| (49) Clerk of Enrolments | Abolished 5, 6 Vict. c. 103 | Clerk of Enrolments<br>3 Clerks<br>(5, 6 Vict. c. 103) |
| (50) Clerk or Master of Report Office | Abolished 3, 4 Will. IV. c. 94 | Clerk of Records and Writs<br>21 Clerks<br>1 Messenger, 1 Office-keeper, 1 Porter (5, 6 Vict. c. 103) |
| (51) Clerk of the Hanaper | Abolished 15, 16 Vict. c. 87 | Report Office added 18, 19 Vict. c. 134 |
| (52) Petty Bag Office | | Clerk of the Petty Bag<br>2 Clerks<br>1 Office Cleaner<br>(12, 13 Vict. c. 109) |
| (53) Prothonotary | To be abolished 2, 3 Will. IV. c. 111 | |
| (54) Cursitors | Abolished 5, 6 Will. IV. c. 82. Duties transferred to Petty Bag Office | |
| (55) Subpœna Office | Abolished 15, 16 Vict. c. 87. Duties transferred to Clerks of Records and Writs | |
| (56) Sixpenny Writ Office | Abolished 15, 16 Vict. c. 86 | |
| *Offices connected with Bankruptcy Jurisdiction—* | | |
| (57) Secretary of Commissions of Bankrupts | Abolished 15, 16 Vict. c. 77 | |

| | | | |
|---|---|---|---|
| (58) Clerk of Enrolments in Bankruptcy | | Abolished 5, 6 Vict. c. 122 and 15, 16 Vict. c. 77 | |
| (59) Office for execution of laws concerning Bankruptcy | | Abolished 2, 3 Will. IV. c. 111 | |
| (60) Receiver of the Fines | | | |
| *Vice-Chancellor's* (53 *Geo III. c.* 24) *Officers*— | | | |
| | Secretary to the Vice-Chancellor<br>Train-bearer to the Vice-Chancellor<br>Usher to the Vice-Chancellor | Appointed 53 Geo. III. c. 24 | 3 Secretaries to the Vice-Chancellors<br>3 Clerks of the Chamber<br>3 Train-bearers<br>1 Usher<br>6 Order Keepers<br>2 Caretakers of Court<br>(5 Vict. c. 5) |
| *Lord's Justices Officers*— | | | |
| | 5 Commissioners of Lunatics | | 2 Secretaries<br>2 Clerks of the Chamber<br>2 Train-bearers<br>2 Order-Keepers<br>1 Caretaker of Court<br>(14, 15 Vict. c. 83)<br>2 Masters in Lunacy<br>12 Clerks<br>1 Office keeper<br>(5, 6 Vict. c. 84; 8, 9 Vict. c. 100)<br>3 Visitors of Lunatics<br>1 Secretary<br>4 Clerks<br>(16, 17 Vict. c. 70; 25, 26 Vict. c. 86)<br>Surveyor<br>Stockbroker<br>(15, 16 Vict. c. 87 § 21)<br>Official Solicitor to the High Court of Chancery.<br>(Appointed 1836)<br>6 Conveyancing Counsel to the Court of Chancery<br>(15, 16 Vict. c. 80) |

## XXVII

## TRIAL BY BATTLE



This picture is the reproduction of an engraving to be found in Madox's "History of the Exchequer" (i. 551). It is taken from an Assize Roll of Henry III.'s reign, the date of which is uncertain (Select Pleas of the Crown, S.S. i. xxix.). It represents a trial by battle in a criminal case, fought between Walter Bloweberme and Hamon le Starre. Walter Bloweberme had appealed Hamon le Starre of robbery. Hamon elected to defend himself by battle. He was defeated and hanged.

*Trial by Battle upon issue joined in a writ of right.*

When the tenant in a writ of right pleads the general issue, *viz.*, that he hath more right to hold than the demandant hath to recover, and offers to prove it by the body of his champion, which tender is accepted by the demandant; the tenant in the first place must produce his champion, who, by throwing down his glove as a gage or pledge, thus *wages* or stipulates battle with the champion of the demandant, who, by taking up the gage or glove, stipulates on his part to accept the challenge. The reason why it is waged by champions, and not by the parties themselves, in civil actions, is because, if any party to the suit dies, the suit must abate and be at an end for the present; and therefore no judgment could be given for the lands in question, if either of the parties were slain in battle, and also that no parties might claim an exemption from this trial, as was allowed in criminal cases where the battle was waged in person.

A piece of ground is then in due time set out, of sixty feet square, enclosed with lists, and on one side a court erected for the judges of the court of common pleas, who attend there in their scarlet robes; and also a bar is prepared for the learned serjeants at law. When the court sits, which ought to be by sunrising, proclamation is made for the parties, and their champions, who are introduced by two knights, and are dressed in a suit of armour, with red sandals, bare legged from the knees downwards, bare headed, and with bare arms to the elbows. The weapons allowed them are only batons, or staves, of an ell long, and a four cornered leather target, so that death very seldom ensued in this civil combat. . . . When the champions, thus armed with batons, arrive within the lists or place of combat, the champion o the tenant then takes his adversary by the hand, and makes oath that the tenements in dispute are not the right of the demandant, and the champion of the demandant, then taking the other by the hand, swears in the same manner that they are; so that each champion is, or ought to be,

thoroughly persuaded of the truth of the cause he fights for. Next an oath against sorcery and enchantment is to be taken by both the champions, in this or similar form: "Hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone nor grass; nor any enchantment, sorcery or witchcraft, whereby the law of God may be abased, or the law of the devil exalted. So help me God and His saints."

The battle is thus begun, and the combatants are bound to fight till the stars appear in the evening, and, if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession; but, if the victory declares itself for either party, for him is judgment finally given. This victory may arise from the death of either of the champions, which indeed hath rarely happened, the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which are probably derived from this original. Or victory is obtained if either champion proves *recreant*, that is, yields, and pronounces the horrible word of *craven*, a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it is indeed to the vanquished champion, since, as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned, as a recreant, *amittere liberam legem*, that is, to become infamous and not be accounted *liber et legalis homo*; being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause. BL. COMM. III. 338-341.

*Trial by Battle upon an appeal of felony.*

The form and manner of waging battle upon appeals are much the same as upon a writ of right, only the oaths of the two combatants are vastly more striking and solemn. The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the same by his body. The appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to this effect: "Hear this, O man whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor are any way guilty of the said felony. So help me God and the saints, and this I will defend against thee by my body, as this court shall award." To which the appellant replies, holding the Bible and his antagonist's hand in the same manner as the other: "Hear this, O man whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that thou feloniously did murder my father, William by name. So help me God and the saints; and this I will prove against thee by my body, as this court shall award." The battle is then to be fought with the same weapons, *viz.* batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat; and if the appellee be so far vanquished, that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately; and then, as well as if he be killed in battle, providence is deemed to have determined

in favour of the truth, and his blood shall be attainted. But if he kills the appellant, or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So also if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall loose his *liberam legem*, and become infamous, and the appellee shall recover his damages, and also be for ever quit, not only of the appeal, but of all indictments likewise for the same offence.

BL. COMM. IV. 341, 342.

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